84-1491

No.____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PHILADELPHIA NEWSPAPERS, INC., et al.
Appellants

v.

MAURICE S. HEPPS, et al.
Appellees

On Appeal From The Judgment of the Supreme Court of Pennsylvania

JURISDICTIONAL STATEMENT

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104 pp

QUESTIONS PRESENTED BY THE APPEAL

A.

Did the Supreme Court of Pennsylvania err in upholding the constitutionality of a Pennsylvania statute which requires a defendant publisher to bear the burden of proving the truth of its publication as a defense to a private figure defamation action?

B.

May a private figure libel plaintiff recover damages from a newspaper defendant without proving the falsity of the complained-of publication?

C.

Can the falsity of a publication constitutionally be *presumed* solely from the defamatory character of the words used?

CITATIONS TO OPINIONS

The Opinion of the Supreme Court of Pennsylvania, which appears in the Appendix, is reported at ____Pa. ____, 485 A.2d 374 (1984).

The Opinion of the trial court, which also appears in the Appendix, has not been officially reported. An earlier opinion of the trial court, dealing with pretrial discovery matters, is reported at 3 Pa.D&C3d 693 (Chester Cty. C.P. 1977).

LIST OF ALL PARTIES

The parties to the proceeding in the Supreme Court of Pennsylvania were as follows:

Appellants:
Philadelphia Newspapers, Inc.
William Ecenbarger
William Lambert

Appellees:
Maurice S. Hepps
General Programming, Inc.
A. David Fried, Inc.
Brookhaven Beverage Distributors, Inc.
Busy Bee Beverage Co.
ALMIK, Inc.
Lackawanna Beverage Distributors
N.F.O., Inc.
Elemar, Inc.

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STATEMENT OF JURISDICTIONAL GROUNDS

1. The underlying action is a suit for defamation by plaintiffs held to be private figures by the trial court. After a six-week trial, the trial judge, holding invalid a Pennsylvania statute which required the defendant to bear the burden of establishing the truth of its publication as a defense to the action, charged the jury that plaintiffs bore the burden of establishing the falsity of the publications in issue. From the trial court's denial of post-trial motions, plaintiffs filed a direct appeal to the Pennsylvania Supreme Court pursuant to 42 Pa.C.S. §772(7). In an opinion entered December 14, 1984, the court upheld the validity of the challenged statute, reversed the order of the trial court denying post-trial motions, and awarded plaintiffs a new trial.

2. Judgment was entered by the Supreme Court of Pennsylvania on December 14, 1984, and a Notice of Appeal was filed with the Pennsylvania Supreme Court on March 14, 1985. Copies of the Judgment and Notice of Appeal are set forth in the Appendix.

3. Jurisdiction of this Court is conferred by 28 U.S.C. §1257(2) in that there is drawn into question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States, and the decision of the highest state tribunal was in favor of the statute's validity.

4. The provisions of 28 U.S.C. §2403(b) may be applicable and, accordingly, service of this Jurisdictional Statement has been made upon the Attorney General of the Commonwealth of Pennsylvania.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

2. United States Constitution, Amendment XIV, §1:

> ". . . [N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

3. Pennsylvania Consolidated Statutes, 42 Pa.C.S. §8343, Act of July 9, 1976, P.L. 586, No. 142, §2:

> "§8343. BURDEN OF PROOF
>
> (a) *Burden of plaintiff.* In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:
>
> (1) The defamatory character of the communication.
> (2) Its publication by the defendant.
> (3) Its application to the plaintiff.
> (4) The understanding by the recipient of its defamatory meaning.
> (5) The understanding by the recipient of it as intended to be applied to the plaintiff.
> (6) Special harm resulting to the plaintiff from its publication.
> (7) Abuse of a conditionally privileged occasion.
>
> (b) *Burden of defendant.* In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:
>
> (1) The truth of the defamatory communication.
> (2) The privileged character of the occasion on which it was published.
> (3) The character of the subject matter of defamatory comment as of public concern."

STATEMENT OF THE CASE

A. Procedural History

This action for libel under the laws of the Commonwealth of Pennsylvania was instituted in May 1976 in the Court of Common Pleas of Chester County, Pennsylvania. Plaintiffs were Maurice S. Hepps, principal stockholder of General Programming, Inc. ("General"), General, and a number of independent corporate entities which operated beer and beverage distributorships as franchisees of General. Plaintiffs complained of a series of articles published in *The Philadelphia Inquirer*[1] which allegedly "linked" them to certain "underworld" figures.

Although the articles in suit concerned plaintiffs' involvement with, *inter alia*, high-ranking officers of the Commonwealth of Pennsylvania, the trial court, in a pretrial order denying defendants' Motion for Summary Judgment, ruled that plaintiffs were "private figures" who could recover for defamation upon a showing of negligence.

Trial of the action commenced on June 8, 1981 and consumed six weeks. Plaintiffs expressly alleged falsity in their Complaint, and plaintiffs' counsel argued falsity vehemently and repeatedly in his opening remarks to the jury. In its instructions to the jury, the trial court charged that plaintiffs bore the burden of proving the falsity of the complained-of publications. On July 13, 1981, the jury returned a general verdict in favor of defendants. A timely Motion for New Trial contested, *inter alia*, the court's refusal to follow the Pennsylvania "Burden of Proof" statute, 42 Pa.C.S. §8343, which places the burden of proving truth upon defendant. The Motion for a New Trial was denied by Order dated December 21, 1982, and final judgment was entered on February 15,

1. Appellant Philadelphia Newspapers, Inc. is the publisher of *The Philadelphia Inquirer*. The individual appellants are reporters for *The Inquirer*.

1983. The trial court's lengthy Opinion entered on October 24, 1983, held, *inter alia*, that the common law rule embodied in Pennsylvania's Burden of Proof statute, which places upon a publisher the burden of proving the truth of its publication as a defense to the action, was violative of the First Amendment.

Following the entry of judgment, plaintiffs filed a direct appeal to the Pennsylvania Supreme Court, which permits such appeals where a trial level court of general jurisdiction has held a state statute invalid as repugnant to the Constitution of the United States. 42 Pa.C.S. §722(7). In an Opinion dated December 14, 1984, that court held[2] "that in a libel suit brought by a private individual for compensatory damages resulting from the defamatory material, the presumption of falsity remains and the defendant has the option of proving truth as an absolute defense to the action." ____Pa. ____, 485 A.2d at 387.

B. Facts

Between May 5, 1975, and May 2, 1976, five news articles were published in *The Philadelphia Inquirer* concerning plaintiffs, who at that time were known as the "Thrifty Beverage" chain. As characterized by the plaintiffs, the thrust of these news articles was that:

> (a) Former State Senator Frank Mazzei, a convicted felon, used political influence to allow the Thrifty chain, in which he owned an interest, to continue to do business even though it was operating in violation of state law;
>
> (b) Senator Mazzei's motivation for protecting the Thrifty chain was not limited to his financial interest, but also extended to the fact that the chain had a variety of ties to organized crime through one Joseph Scalleat and others; and
>
> (c) Therefore, the Thrifty chain was closely connected with organized crime.

2. Two of the seven members of the Pennsylvania Supreme Court recused themselves from participation in the hearing or decision of this matter due to the pendency of their own defamation actions against the corporate defendant herein.

Throughout the course of the trial, plaintiffs attempted to refute what they perceived as the thrust of the articles with evidence designed to show that they were not connected with organized crime, that they were not operating in violation of state law, and that Senator Mazzei had not used improper political influence on their behalf.

REASONS WHY THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. This Court has Previously Determined that the Questions Presented Herein Were so Substantial as to Require Review

The questions presented in this appeal raise issues of substantial concern to the media generally and, ultimately, to the reading public. Indeed, this Honorable Court previously has recognized the importance of the identical issues in granting a Writ of Certiorari in *Wilson v. Scripps-Howard Broadcasting Company*, 642 F.2d 371 (6th Cir.), *cert. granted*, 454 U.S. 962, *cert. dismissed pursuant to Rule 53*, 454 U.S. 1130 (1981). In *Wilson*, this Court issued the Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit upon the following question:

> "A. Did the Court of Appeals err in holding that the First and Fourteenth Amendments to the United States Constitution require that private-figure libel plaintiffs bear the burden of proving the falsity of a

defamatory communication in contravention to State law?[3]

Courts throughout the country have been grappling with the issue of whether private libel plaintiffs must prove falsity — and reaching widely divergent results — since this Court decided *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Decisions in 12 jurisdictions seem to require that a private defamation plaintiff prove falsity;[4] two states require the plaintiff to prove falsity where the publication involves matters of public interest;[5] and two additional states have suggested that plaintiff must prove

3. Two other subsidiary questions also were set forth in the Petition for a Writ of Certiorari, as follows:

"B. If the Court of Appeals was correct in its ruling on the burden of proof issue, did the jury instructions in this case, in fact, allocate to plaintiff the burden of proving falsity?

"C. If the Court of Appeals was correct in ruling on the burden of proof issue, was the evidence in this case sufficient to support a jury finding that the defamatory communication at issue was false?"

4. *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A.2d 1317 (1982); *Harrison v. Washington Post Company*, 391 A.2d 781 (D.C. 1978); *Smith v. Taylor County Pub. Co., Inc.*, 443 So.2d 1042 (Fla.Dist.Ct.App. 1983); *Applestein v. Knight Newspapers, Inc.*, 337 So.2d 1005 (Fla.Dist.Ct.App. 1976); *Troman v. Wood*, 62 Ill.2d 184, 340 N.E.2d 292 (1975); *Jacron Sales Co., Inc., v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Brennan v. Globe Newspaper Co.*, 9 Med.L.Rptr. (BNA) 1147 (Mass.Super. 1982); *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252 (Minn. 1980); *Anton v. St. Louis Suburban Newspapers, Inc.*, 598 S.W.2d 493 (Mo.Ct.App. 1980); *Madison v. Yunker*, 589 P.2d 126 (Mont. 1978); *Brown v. Boney*, 41 N.C.App. 636, 255 S.E.2d 784, *cert. denied*, 298 N.C. 294, 259 S.E.2d 910 (1979); *Hersch v. E. W. Scripps Co.*, 3 Ohio App.3d 367, 445 N.E.2d 670 (1981); *Foster v. Laredo Newspapers, Inc.*, 541 S.W.2d 809 (Tex. 1976), *cert. denied*, 429 U.S. 1123 (1977).

5. *Ross v. Gallant, Farrow & Co.*, 27 Ariz.App. 89, 551 P.2d 79 (1976); *Fairley v. Peekskill Star Corp.*, 83 App.Div.2d 294, 445 N.Y.S.2d 156 (1981).

falsity.[6] In addition to Pennsylvania, four states appear to have retained the common law presumption that defamatory words are false and that, if raised, the defense of truth must be proven by the defendant.[7] Within some jurisdictions, decisions on the burden of proof issue appear to conflict.[8] And, finally, 27 jurisdictions have not decided, post-*Gertz*, whether a private plaintiff must prove falsity or whether the media defendant bears the burden of providing truth.[9]

6. *Diaz v. Oakland Tribune, Inc.*, 139 Cal.App.3d 118, 188 Cal.Rptr. 762 (1983); *McCall v. Courier Journal and Louisville Times Co.*, 623 S.W.2d 882 (Ky. 1981), *cert. denied*, 456 U.S. 975 (1982).

7. *Gobin v. Globe*, 229 Kan. 1, 620 P.2d 1163 (1980); *Rogozinski v. Airstream By Angell*, 152 N.J.Super. 133, 377 A.2d 807 (1977), *modified*, 164 N.J.Super. 465, 397 A.2d 334 (1979); *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976); *Denny v. Mertz*, 106 Wis.2d 636, 318 N.W.2d 141, *cert. denied*, 456 U.S. 883 (1982).

8. *Compare Elliott v. Roach*, 409 N.E.2d 661 (Ind.App. 1980) (defendant bears burden of proving truth) *with Local 15 v. International Brotherhood of Electrical Workers*, 273 F.Supp. 313 (N.D.Ind. 1967) (applying Indiana law) (plaintiff must prove falsity); *compare Trahan v. Ritterman*, 368 So.2d 181 (La.App. 1st Cir. 1979) (falsity presumed where words are defamatory *per se*) *with Ward v. Sears, Roebuck & Co.*, 339 So.2d 1255 (La.App. 1st Cir. 1976) (plaintiff must prove falsity); *compare Wilson v. Scripps-Howard Broadcasting Company*, 642 F.2d 371 (6th Cir.), *cert. granted*, 454 U.S. 962, *cert. dismissed pursuant to Rule* 53, 454 U.S. 1130 (1981) (plaintiff must prove falsity) *with Memphis Pub. Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978) (defamatory statements are presumed false).

9. Alabama, Alaska, Arkansas, Colorado, Delaware, Georgia, Hawaii, Idaho, Iowa, Maine, Michigan, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming.

B. The First and Fourteenth Amendments to the United States Constitution Mandate that No Liability be Imposed Upon Speech Not Proven to be False

In *Bose Corporation v. Consumers Union*, ____U.S. ____, 80 L.Ed.2d 502 (1984), this Court re-emphasized that in cases raising First Amendment issues appellate courts are obligated to ensure that there is no "forbidden intrusion on the field of free expression." *Id.* at 515, citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In the process of "categorizing" speech, First Amendment protection has been denied only to that narrow category of speech demonstrated to be "no essential part of any exposition of ideas, and . . . of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

Prior to this Court's opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), libelous speech about private affairs was deemed to be outside the area of First Amendment protection. *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952). *Gertz* recognized, however, that even purely private speech is deserving of constitutional protection, holding that only "false statements of fact" published with "fault" were outside the sphere of the protected zone. *Id.* at 340, 347. Indeed, the rationale of this Court's decisions granting constitutional protection to pure commercial speech is essentially the same as that involved in the libel area, *viz.* all speech, except "false statements of fact," has constitutional value. *Bose, supra*, 80 L.Ed.2d at 519, n.22, quoting *Gertz, supra*. Conversely, because truthful speech cannot be deemed to be outside of the zone of legitimate expression, such speech is entitled to full constitutional protection. Moreover, *Gertz* recognized that because it is necessary to provide "breathing space" for the exercise of First Amendment freedoms, *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963), even

false statements of fact are entitled to constitutional protection if made without fault. *Gertz, supra*, 418 U.S. at 347.

Under the Pennsylvania Burden of Proof statute, the validity of which was upheld by the Pennsylvania Supreme Court by the judgment now under review, liability may be imposed without proof that the publication is outside of the protected zone, *i.e.*, false. The logic of *Gertz*, however, requires that no liability be imposed unless plaintiff is able to demonstrate, by either clear and convincing evidence or, at a minimum, a preponderance of the evidence, that the publication is false.

Following *Gertz*, the Restatement (Second) of Torts §580B, comment j, recognized that the burden of proving falsity must be placed upon plaintiff. The comment notes:

> "The burden of proof of showing fault is undoubtedly upon the plaintiff. If the plaintiff has the burden of showing that the defendant was negligent in failing to ascertain the falsity or the defamatory character of the statement or that he acted recklessly or knowingly in this regard, there remains little, if any, significance in the common law position that truth of the statement is a defense to be raised by the defendant and on which he has the burden of proof. (See Section 581A). As a practical matter, in order to meet the constitutional obligation of showing defendant's fault as to truth or falsity, the plaintiff will necessarily find that he must show the falsity of the defamatory communication."

See also id., §581A, comment b; §613. And the Court of Appeals of Maryland, addressing the issue directly in *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688, 698 (Md. 1976), stated that, "under the negligence standard which we adopt here, truth is no longer an affirmative defense . . . but instead the burden of proving falsity rests upon the plaintiff, since, under this standard,

he is already required to establish negligence with respect to such falsity." *Accord, Jenoff v. Hearst Corp.*, 644 F.2d 1004, 1008 (4th Cir. 1980).

As noted in part A above, the Sixth Circuit's decision in *Wilson v. Scripps-Howard, supra*, confirms that the *Gertz* fault requirement imposes the burden of proving falsity on the private figure libel plaintiff. Addressing the issue of "whether in light of *Gertz* the First Amendment controls the question of who has the burden of proof on the issue of truth or falsity when the plaintiff is not a public figure," the Sixth Circuit held that "[a]s a matter of federal First Amendment law, the burden must be placed on the plaintiff to show falsity." *Id.* at 374, 376. Its reasoning, *id.* at 375 (emphasis added) (footnote deleted), was as follows:

> "It would ordinarily be impossible to determine whether the defendant exercised reasonable care and caution in checking on the truth or falsity of a statement without first determining whether the statement was false. *The publisher's carelessness must have caused an error in accuracy, an error in failing to ascertain that the defamatory statement was false.* The two elements of carelessness and falsity are inevitably linked, for *a defendant should not be liable if it 'took every reasonable precaution to insure the accuracy of its assertions.' Gertz, supra,* 418 U.S. at 346. Fault then must be held to consist of two elements: carelessness and falsity.
>
> "In order for the jury to decide the issue of fault, it must weigh together and balance the facts concerning falsity and the facts concerning carelessness. The degree of uncertainty in the juror's mind on the issue of truth and the degree of uncertainty on the issue of carelessness must be taken into account at the same time in arriving at a conclusion on the issue of fault. Fairness and coherent consideration of the issue lead us to the conclusion that the party with the burden of proving carelessness must also carry the burden of proving falsity as a part of the concept of fault."

CONCLUSION

The allocation of the burden of proving truth or falsity in private figure defamation actions raises substantial constitutional issues which have been the subject of numerous decisions by state courts since this Court's decision in *Gertz, supra*.

The possibility that a defamation award can be premised upon truthful speech, or at least upon speech not proven to be false, presents an issue of fundamental import. This Court has previously recognized the importance of this issue in granting a Petition for Writ of Certiorari.

The instant action, which presents the Court with a full trial record and lengthy opinions of both the state trial and appellate courts and which isolates the "burden of proof" issue with unusual clarity, is appropriate for plenary consideration by this Court.

Accordingly, appellants respectfully urge this Court to note probable jurisdiction and grant plenary consideration of the questions presented herein, with briefs on the merits and oral argument.

Respectfully submitted,

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APPENDIX

APPENDIX

1. Opinion of the Pennsylvania Supreme Court dated December 14, 1984 ..... A-1
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APPENDIX 1

[J-66-1984]
IN THE SUPREME COURT OF PENNSYLVANIA
Eastern District

MAURICE S. HEPPS, et al.	: No. 18 E.D. Appeal Dkt. 1983
v.	:
PHILADELPHIA NEWSPAPERS, INC., WILLIAM ECENBARGER, and WILLIAM LAMBERT	: Appeal from the Order of the Court of Common Pleas of Chester County dated February 15, 1983, entered at No. 36 May Term, 1976.
Appeal of MAURICE S. HEPPS, et al.	: ARGUED: April 9, 1984

OPINION

NIX, *C. J.* FILED: DECEMBER 14, 1984

The instant civil libel action resulted from a series of five "investigative" articles appearing in *The Philadelphia Inquirer* which purported to link Maurice S. Hepps, General Programming, Inc. and a number of independent corporate entities who operated beer and beverage distributorships as franchises of General Programming, Inc. to certain named "underworld" figures and to organized crime generally. Maurice Hepps, the individual plaintiff-appellant was the principle stockholder of the corporate plaintiff-appellant, General Programming, Inc. ("General"). General owns the trademarks "Thrifty Beverage" and "Brewer's Outlet," and licenses such marks and provides management and consultation services to licensees. The remaining corporate and individual plaintiff-appellants, approximately nineteen in number, are li-

censees of General. As a result of these articles, the plaintiff-appellants instituted a civil action in libel against Philadelphia Newspapers, Inc., the publisher of the newspaper in question, and William Ecenbarger and William Lambert, the reporters who prepared the series of articles.

After a six-week trial, the jury returned a general verdict in favor of defendant-appellees. Plaintiff-appellants based their challenge to the judgment rendered below upon the trial court's decision to instruct the jury that the plaintiff bears the burden of proving the falsity of the defamatory publication. This instruction was given after the trial court had ruled that 42 Pa. C.S. §8343(b)(1) was unconstitutional in that it requires the defendant in a civil libel suit to establish the truth of the defamatory publication by way of an absolute defense to the action. Plaintiff-appellants also appeal the trial court's dismissal of their claim for punitive damages. This direct appeal seeking the award of a new trial is entertained by this Court pursuant to 42 Pa. C.S. §722(7).

I.

It has long been the decisional law of this Commonwealth that truth is a complete defense to a civil action for libel, and that the burden of proving truth rests upon the defendant. *Matson v. Margiotti*, 371 Pa. 188, 88 A.2d 892 (1952); *Kilian v. Doubleday & Co., Inc.*, 367 Pa. 117, 79 A.2d 657 (1951); *Montgomery v. Dennison*, 363 Pa. 255, 69 A.2d 520 (1949); *Mulderig v. Wilkes Barre Times*, 215 Pa. 470, 64 A. 636 (1906); *Burkhart v. North American Co.*, 214 Pa. 39, 63 A. 410 (1906); *Bryant v. Pittsburgh Times*, 192 Pa. 585, 44 A. 251 (1899); *Wood v. Boyle*, 177 Pa. 620, 35 A. 853 (1896); *Collins v. Dispatch Pub. Co.*, 152 Pa. 187, 25 A. 543 (1893); *Conroy v. Pittsburgh Times*, 139 Pa. 334, 21 A. 154 (1891); *McLenahan v. Andrews*, 135 Pa. 383, 19 A. 1039 (1890);

Press Co. v. Stewart, 119 Pa. 584, 14 A. 51 (1888); *Rowan v. DeCamp*, 96 Pa. 493 (1880); *Barr v. Moore*, 87 Pa. 385 (1878); *Burford v. Wible*, 32 Pa. 95 (1858); *Crapman v. Calder*, 14 Pa. 365 (1850); *Steinman v. McWilliams*, 6 Pa. 170 (1847). In 1953, this common law principle was codified in the Act of August 21, 1953, P.L. 1291, No. 363, §1(2)(a), 12 P.S. §1584a(b)(1) (Repealed 1978), which provided:

> In an action for defamation, the defendant has the burden of proving, when the issue is properly raised;
>
> The truth of the defamatory communication.

The provision was reenacted in the Judicial Code on July 19, 1976, effective June 27, 1978, 42 Pa. C.S. §8343(b)(1):

> Burden of defendant.—In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:
>
> The truth of the defamatory communication.
>
> * * *

Thus the section now being challenged is the codification of the decisional law as it has developed over the last century in this Commonwealth on this subject. We are now called upon to determine whether section 8343(b)(1), which places upon the defendant in a libel suit the burden of proving the truth of defamatory statements, is constitutionally infirm in view of the relatively recent interpretations of the First Amendment of the United States Constitution as expressed by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. *See, e.g., Bose Corp. v. Consumers Union of U.S., Inc.*, ____U.S. ____, 80 L.Ed. 2d 502 (1984); *Wolston v. Reader's Digest Ass'n., Inc.*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Herbert v. Lando*, 441

U.S. 153 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); *Time, Inc. v. Pape*, 401 U.S. 279 (1971); *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971); *Greenbelt Cooperative Publishing Ass'n. v. Bresler*, 398 U.S. 6 (1970); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

A.

Before examining the United States Supreme Court decisions relating to the impact of the First Amendment upon this area of the law, it is instructive to briefly review the Pennsylvania law of libel as it has developed over the years. The underlying premise concerning the character of the defamed individual is the principle that any man accused of wrong-doing is presumed innocent until proven guilty. The decisions reasoned this principle transcended the criminal law and was equally applicable to the ordinary affairs of life. *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 448-49, 273 A.2d 899, 907 (1971). *Montgomery v. Dennison, supra* at 263 n.2, 69 A.2d at 525 n.2. Based upon this premise we developed the rule that in actions for defamation, the general character or reputation of the plaintiff is presumed to be good. *Corabi, supra* at 449, 273 A.2d at 908; *Klumph v. Dunn*, 66 Pa. 141, 147 (1870); *Hartranft v. Hesser*, 34 Pa. 117, 119 (1859); *Chubb v. Gsell*, 34 Pa.114, 116 (1859). Since the gravamen of defamation is that the words uttered or written tend to harm the reputation, a consequence of the rule presuming the good reputation of the plaintiff was a presumption of the falsity of the defamatory words. *Corabi, supra; Hartranft v. Hesser, supra.*

Evidentiary considerations have also been offered to justify the presumption. As noted by this Court in *Corabi:*

> Moreover, it is manifestly the fair thing to place upon the defendant the burden of proving truth: *Montgomery v. Dennison,* supra n.2 at 263; 9 Wigmore, Evidence §2486, at 276 (3d ed. 1940). Although not invariably so, it is preferable to place the burden of proof upon the party having in form the affirmative allegation and/or upon the party who presumably has peculiar means of knowledge of the particular fact in issue: See Wigmore, Evidence §2486, supra. For example, in the context of libel, if the written communication accuses plaintiff of being a murderess, a burglar or a prostitute, the defendant knows precisely what particular event he is referring to and the source of his information, whereas the plaintiff, not knowing these facts, would experience great difficulty in refuting these general charges by showing their falsity.
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> *Id.* at 450-451, 273 A.2d at 908-09 (footnotes omitted).

Particularly, where the accusation is totally general and without the specificity necessary for a response, the absence of such a presumption would force the plaintiff in the unenviable position of proving the negative. *Corabi, supra* at 450, 273 A.2d at 907; *Conroy v. Pittsburgh Times, supra* at 339, 21 A. at 156.[1]

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1. Another rationale offered to support the presumption of the good character or innocence of the plaintiff was the view that it would be unduly prejudicial to the defendant to permit the plaintiff to prove his general good character in the plaintiff's case-in-chief. In Hartranft v. Hesser, 34 Pa. 117, 119 (1859), it was stated that the plaintiff is not permitted to prove his general good character because to permit such evidence would be to take advantage of the defendant who was unapprised of its nature or to raise a collateral issue not made by the pleadings in the case. *Id.* Thus, character evidence in

Although falsity of the defamatory words is presumed, proof of the truth of the words by the defendant is a complete and absolute defense to a civil action for libel. *Pierce v. Cities Communications, Inc.*, 576 F.2d 495, 507, *cert. denied*, 439 U.S. 861 (1978); *Lowenschuss v. West Publishing Co.*, 542 F.2d 180, 184 (3d Cir. 1976); *Keddie v. Pennsylvania State University*, 412 F. Supp. 1264 (M.D. Pa. 1976); *Fram v. Yellow Cab Co. of Pittsburgh*, 380 F. Supp. 1314 (W.D. Pa. 1974); *Corabi, supra* at 449, 273 A.2d at 907; *Schonek v. WJAC, Inc.*, 436 Pa. 78, 84 258 A.2d 504, 507 (1969); *Schnabel v. Meredit*, 378 Pa. 609, 612, 107 A.2d 860, 862 (1954); *Montgomery v. Dennison, supra* at 264, 69 A.2d at 525; *Hartranft v. Hesser, supra* at 119; *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. 475, 485-86, 448 A.2d 6, 11 (1982); *Badami v. Dimson*, 226 Pa. Super. 75, 77, 310 A.2d 298, 300 (1973); Restatement (Second) of Torts §581A, comment b, at 235-36 (1976). Under our law, since truth is an absolute defense, whether the defamatory statements were made willfully or negligently, Restatement (First) of Torts §582 comment (a) (1938), a civil action in libel is only actionable, at least in theory, where the defamatory statement is also false.[2]

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defamation cases follows the general rule that "In civil proceedings, evidence of character is inadmissible unless directly in issue or involved in the nature of the proceedings, and *even then evidence of good character is not admissible unless and until it is attacked by evidence to the contrary, it being presumed to be good in absence of proof that it is bad*. 1 G. Henry, Pennsylvania Evidence §152 (1953) (emphasis added) *citing* Costello v. Long, 62 Pa. Super. 13, 17 (1915); Burkhart v. North American Co., 214 Pa. 39, 42, 63 A.410, 411 (1906); Clark v. North American Co., 203 Pa. 346 353, 53 A. 237, 239 (1902); Chubb v. Gsell, 34 Pa. 114, 116 (1859). *See also* 22 P.L.E. *Libel and Slander* §57 (1959).

2. In *Corabi* it is stated that falsity is not an element of the civil action of libel under our law. *Id.* at 449, 273 A.2d at 908. This statement is troubling. The fact that an element is presumed and can only be overcome by affirmative evidence establishing the contrary, does not remove it as an element of the cause of action. If such was the case, there would be no need for the presumption in the first instance. *See* Waugh v. Commonwealth, 394 Pa. 166, 146 A.2d 297 (1959); Waters v. New Amsterdam Casualty Co., 393 Pa. 247, 144 A.2d 354 (1958); MacDonald v. Pennsylvania R. Co., 348 Pa. 558, 36 A.2d 492 (1944); Smith v. Kingsley, 331 Pa. 10, 200 A.11 (1938); Watkins v. Prudential Ins. Co. of America, 315 Pa. 497, 173 A. 644 (1934). A more accurate statement of our law is that, although falsity is an element of the cause of action, we have concluded that the burden should be placed upon the alleged defamer to establish the truth of these accusations and will presume it in the absence of proof to the contrary.

Rosenbloom, supra at 37; *Harbridge v. Greyhound Lines, Inc.*, 294 F. Supp. 1059 1063 (E.D. Pa. 1969); *Corabi, supra* at 448-49, 273 A.2d at 908; *Young v. Geiske*, 209 Pa. 515, 519, 58 A. 887, 888 (1904); *Wood v. Boyle, supra* at 631, 35 A. at 854; *Collins v. Dispatch Pub. Co., supra* at 189-90, 25 A. at 547; *Barr v. Moore, supra* at 391; Restatement (First) of Torts §558 (1938). The cause of action arises not only because the words injure the reputation of another, but also because the publication is false. The defamatory nature of the comment, regardless of how injurious to the reputation, is not alone actionable. *Rosenbloom, supra* at 37; *Harbridge v. Greyhound Lines, Inc., supra* at 1063; *Corabi, supra* at 448-49, 273 A.2d at 908; *Young v. Geishe, supra* at 519, 58 A. at 888; *Wood v. Boyle, supra* at 631, 35 A. at 853; *Collins v. Dispatch Pub. Co., supra* at 189-90, 25 A. at 547; *Barr v. Moore, supra* at 391.

Even though false, published materials may not give rise to liability where it is privileged. The publisher of the defamatory falsehood under the traditional Pennsylvania law of defamation is not a guarantor of the truth of the materials published. However, privilege is abused if the defamatory statement is negligently published. In *Montgomery v. Philadelphia*, 392 Pa. 178, 140 A.2d 100 (1958), it was stated that the defense of privilege in cases of defamation "rests upon the . . . idea, that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some

interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation." 392 Pa. at 181, 140 A.2d at 102, *quoting* W. Prosser, *Torts* §607 (2d ed. 1955). Thus, truth was never the *only* defense to a civil libel action in Pennsylvania. This concept was clearly set out in *Diamond v. Krasnow*, 136 Pa. Super. 68, 7 A.2d 65 (1939), which stated that the immunity of a privileged communication "is an exception to the general rule that nothing short of the truth is a defense. . . ." *Id.* at 76, 7 A.2d at 69, *citing Stevenson v. Morris*, 288 Pa. 405, 136 A. 234 (1927); *Hartman v. Hyman*, 287 Pa. 78, 134 A. 486 (1926); *Montgomery v. New Era Printing Co.*, 229 Pa. 165, 78 A. 85 (1910); *Mulderig v. Wilkes-Barre Times, supra; McGaw v. Hamilton*, 184 Pa. 108, 39 A. 4 (1898); *Conroy v. Pittsburgh Times, supra; Russell v. Pa. Mut. Life Ins. Co.*, 118 Pa. Super. 351, 179 A.798 (1935); *McGerary v. Leader Publish. Co.*, 52 Pa. Super. 35 (1912); *Collins v. News Co.*, 6 Pa. Super. 330 (1898).

Nonetheless, tradition, evidentiary considerations, or any other state determined policy, cannot support the presumption of falsity, if it is offensive to constitutional mandate. Judge Sugerman reviewed the pertinent United States Supreme Court decisions and concluded that we are compelled to reject the rule that the defendant bears the burden of proving truth. We are unquestionably bound by the United States Supreme Court's interpretation of the provisions of the Federal Constitution. *First Pennsylvania Bank v. Lancaster County Tax Claim Bd.*, ____Pa. ____, ____470 A.2d 938, 941 (1983); *Commonwealth v. Ware*, 446 Pa. 52, 56, 284 A.2d 700, 702 (1971), *cert. denied*, 406 U.S. 910 (1972); *Commonwealth ex rel. Banks v. Hendricks*, 430 Pa. 575, 578, 243 A.2d 438, 439 (1968); *Commonwealth v. Robin*, 421 Pa. 70, 72, 218 A.2d 546, 546 (1966); *Carolene Products Co. v. Harter*, 329 Pa. 49, 55, 197 A. 627, 630 (1938). We

will therefore review those decisions and assess Judge Sugerman's conclusions as to their impact under the facts of this case.

B.

At the outset of the discussion of the United States Supreme Court decisions, it must be remembered that the Court was attempting to define the extent of the freedom of expression provided under the First Amendment, and made applicable to the state through the Fourteenth Amendment, as it relates to civil actions for libel under state law. A subsidiary objective was the formulation of a rule that would satisfy the protection found to be constitutionally required. In the words of that Court, they were struggling "to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." *Gertz, supra* at 325. Our purpose for reviewing these decisions at this time is to determine whether our rule of state libel law presuming the good reputation of the plaintiffs and setting up truth as a defense to be established by the defendant runs counter to the present interpretations of the First Amendment mandates.

In *New York Times, supra*, the Supreme Court stated that state law of civil libel "can claim no talismanic immunity from constitutional limitations". *Id.* at 269. That Court then proceeded to conclude that the central meaning of the First Amendment, enforced upon the states through the Fourteenth Amendment, required a privilege of fair comment and honest mistake of fact. The majority held that a public official is prohibited "from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of

whether it was false or not".[3] *Id.* at 279-80.

In the context of criticism of public officials the Court rejected the argument that the availability of the defense of truth, where the burden of establishing it is on the defendant, satisfies the constitutional concerns involved.

> Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which "steer far wider of the unlawful zone". (citations omitted) The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments.
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> *Id.* at 279 (citations omitted).

Although *New York Times* made it clear that no longer would the former view that libel was speech not protected by the First Amendment be without exception, many questions were still left unanswered by that decision as to the full extent of the constitutional privilege developed therein. The *New York Times* decision did not expressly state that the constitutional protection required the shifting of the burden of proving falsity to the plaintiff in establishing a *prima facie* case. Nor did the reasoning of that decision necessarily implicitly compel such a result. *See Corabi, supra* at 468 n.22, 273 A.2d at 917 n.22. In *New York Times*, the Court had no occasion to consider the question of who should bear the burden of proving falsity when it is in fact in issue in the litiga-

3. The *New York Times* decision was without dissent. The three concurring justices would have required an absolute, unconditional privilege to critique official conduct. New York Times v. Sullivan, 376 U.S. 254, 297 (1964) (Black, J. concurring, joined by Douglas, J.); *Id.* at 304-05 (Goldberg, J., concurring, joined by Douglas, J.).

tion. To the contrary, the Court in *New York Times* was concerned with stressing "[t]hat erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive". *Id.* at 271-72.[4]

The major question commanding the attention of the Court in subsequent decisions was the extent to which the *New York Times* rule should apply. In 1967, the Court extended the *New York Times* rule to public figures in *Curtis Publishing Co. v. Butts* and *Associated Press v. Walker*, 338 U.S. 130 (1967). In those cases the plaintiffs were not public officials as was the case in *New York Times*, but rather individuals who had attracted public attention either through the positions they held in society or their activities in affairs of public concern.[5]

4. We note that several of the decision of that Court have stated the *New York Times* holding as requiring proof of falsity as part of the plaintiff's *prima facie* case. For instance in Garrison v. Louisiana, 379 U.S. 64 (1964), Justice Brennan stated:

> We held in New York Times that a public official might be allowed the civil remedy *only if* he establishes that the utterance was false. . . .
>
> *Id.* at 74. (emphasis added)

See also Greenbelt Corp. Publishing Assn. v. Bresler, 398 U.S. 6, 8 (1970); Rosenblatt v. Baer, 389 U.S. 75, 84 (1966).
However, in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), Justice White speaking for the Court again stated that "the prevailing view is that truth is a defense". *Id.* at 489. Thus as to whether the communications intended to be covered by the *Times* rule, required proof of falsity as part of the plaintiff's *prima facie* case under the *New York Times* decision is at best unclear and debatable. Moreover, the subsequent restatement of the *Times* holding in the cited cases can arguably be classified as loose characterizations and thus not determinative of the question as to where the burden of proving falsity, should lie. *See* Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond, 61 Va. L. Rev. 1349, 1383-84 (1975).

5. At this stage of the development of the term a "public figure" is one who through fame, notoriety of achievements, or through voluntary participation in resolution of important public questions, seeks to influence society. Time, Inc. v. Firestone, 424 U.S. 448, 453

However, in *Rosenbloom, supra*, the Court was divided on whether the standard of knowing or reckless falsity applied where the alleged defamatory statements related to a private individual in a matter of public or general concern.[6]

Instant appellee concedes that up to this point the constitutional protection identified in *New York Times* had not been extended to the private citizen seeking redress for an alleged libel under state law. Thus the state could, without reference to the Constitution, assign the burden to prove truth upon the defendant in a private figure libel case. Brief of Appellees at 13. We agree with this concession and add, as previously noted, even if the constitutional protection had been found applicable, it was still unclear up to that point whether placing the burden of proving truth upon the defendant would have

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(1976); Gertz v. Robert Welch, Inc. 418 U.S. 323, 337, 342 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130, 154, 164 (1967); Steaks Unlimited, Inc. v. Deaner, 623 F.2d 264, 273 (3d Cir. 1980). The characteristics of this category deemed to justify the application of the actual malice standard are that the public figure invites public attention, criticism and comment and usually has access to the media to refute any defamatory publicity. *Time, Inc., supra* at 456; *Gertz, supra* at 344; *Steaks Unlimited, supra* at 274.

6. To be distinguished from those included within the "public figure" category is the involuntary public figure. This is an individual who has not attained fame or notoriety and who is thrust into an event of general public interests involuntarily. Times, Inc. v. Firestone, 424 U.S. 448 (1976). Justice Brennan in Rosenbloom v. Metromedia, Inc. 403 U.S. 29 (1971) argued that the "malice standard" should not focus on the nature of the individual involved but rather upon whether the event is one of general public interests. *See also Gertz, supra* at 361 (Brennan, J., dissenting). The *Firestone* Court specifically rejected the Brennan view stating that such an extension would unjustifiably abridge a legitimate state interest in protecting private individuals from libelous publications. *Id.* at 454. Our decision in Matus v. Triangle Publications, Inc., 445 Pa. 384, 286 A.2d 357 (1971), *cert. denied*, 409 U.S. 856 (1972), which adopted the position of the *Rosenbloom* plurality, must therefore be overruled.

been offensive to such a Constitutional mandate. Nevertheless, appellee relies, as did Judge Sugerman, upon the Court decision in *Gertz* as the basis for the view that the First Amendment is here applicable and that placing the burden upon the defendant to prove truth runs afoul of the protection afforded free expression.

C.

In approaching the issue in *Gertz* that the Court was unable to resolve in *Rosenbloom*, they began by recognizing that the difference between the public official and public figure on the one side and the private individual on the other warranted a different approach in the two situations. The Court expressed the belief that "private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery."[7] *Gertz, supra* at 345. After acknowledging the persisting antithesis that must necessarily exist between freedom of speech and press and libel actions,[8] the Court nevertheless concluded that "the states should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual."[9] Acknowledg-

7. The United States Supreme Court has interpreted the First Amendment as affording private individuals a greater protection from defamation than both public officials and public figures because public figures and officials enjoy a greater opportunity to reply to libelous statements and they have also purposefully assumed a position in society which invites attention and comment. By voluntarily assuming such a role in society, public figures and officials relinquish, to a degree, their right to privacy. *Gertz, supra* at 345.

8. The Court noted that since libel is based upon the content of the speech, it limits the freedom of the publisher to express certain sentiments unless the publisher is willing to take the risk of the defense of a civil action in libel. *Gertz, supra* at 342.

9. In this context, the Court noted that the extension of the *New York Times* test proposed by the *Rosenbloom* plurality would "abridge this state interest [protecting private citizens from injury resulting from defamatory falsehood] to a degree that we find un-

ing the legitimacy of the concern of the *New York Times* Court to assure the freedoms of speech and press that "breathing space" essential to their fruitful exercise, *see NAACP v. Button*, 371 U.S. 415 (1963), the *Gertz* Court held that "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to the private individual" provided the state did not create a scheme that imposed liability without fault. *Gertz, supra* at 347.[10]

In reaching this conclusion, the *Gertz* Court stated that it believed its rule would insulate the private citizen from the stringent standard of actual malice, and yet shield the media from the rigors of strict liability.[11] The Court stated that it had chosen this approach "in recog-

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acceptable". *Gertz, supra* at 346.

10. The *Gertz* Court characterized a rule of strict liability as one which compels a publisher or broadcaster to guarantee the accuracy of his factual assertions. *Gertz, supra* at 340. The Court stated that "[a]llowing the media to avoid liability *only* by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." *Id.* (emphasis added).

11. As a caveat to this aspect of the *Gertz* standard, the Court cautioned:

> . . . *At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substantial danger to reputation apparent."* This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defematory potential. Cf. *Time, Inc. v. Hill*, 385 US 374 (1967). Such a case is not now before us, and we intimate no view as to its proper resolution.
>
> *Id.* at 348 (emphasis added; footnote omitted).

Since, however, the defamatory character of the articles in question in this appeal was apparent, the above caveat of *Gertz* is not here applicable.

nition of the strong and legitimate state interest in compensating private individuals for injury to reputation." *Id.* at 348.

However, the Court found that this compelling state interest did not extend beyond compensation for actual injury.

> [W]e hold that the states may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.
>
> *Id.* at 349.

The Court was of the view that the "largely uncontrolled discretion" conferred on juries in presumed damages and the invitation in these instances to juries "to punish unpopular opinion" did offend constitutionally protected free expression. Concluding that presumed damages constituted "gratuitous awards of money damages far in excess of any actual injury," *id.* at 349, the Court reasoned that the state interest in these instances was insufficient to permit recovery unless, at a minimum, at least, the *New York Times* standard is met. Following the same general reasoning as employed in the case of presumed damages, the Court reached the same result for punitive damages.

II.
A.

It is apparent from *Gertz* and the cases following it, *Herbert v. Lando, supra; Time, Inc. v. Firestone, supra;* that the only restraint upon the states mandated by the First Amendment in civil actions for defamatory falsehood brought by a private figure for compensatory damages is that they may not impose liability upon the defendant without fault. As early as 1939 this Court stated, in *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 8 A.2d 302 (1939), that liability for defamatory

falsehood cannot be imposed without fault. The defendant in that case was a broadcasting company that rented its time and facilities to an advertising corporation for the transmission of a series of sponsored radio programs over one of its networks. A script for each program was prepared in advance and submitted to the broadcaster and followed exactly by the performers at rehearsals where it was approved. All participants in the program in question were employed and paid by the advertising company which had rented the time slot. When the program was over one-half completed, one of the participants interpolated an extemporaneous remark.

The trial court found that the interjected "ad lib" was "slanderous per se" and ruled that the defendant's liability was absolute though it was without any fault. In rejecting the trial court's acceptance of a theory of strict liability, Chief Justice Kephart noted:

> In Pennsylvania, the principle of liability without fault for injuries to the person has received scant consideration. The great body of our law of liability for personal injuries is that of liability through fault; liability based almost exclusively on wrongful conduct.
>
> *Id.* at 187, 8 A.2d at 304.

In discussing other areas where some states had imposed strict liability, reference was made to those jurisdictions that were then extending a theory of strict liability to publishers of newspapers for defamatory publications, the Court stated:

> Considering the rule of supposedly absolute liability imposed in some jurisdictions on the publisher of a newspaper for his defamatory publications, and this is the rule here chiefly relied on, a close examination of the Pennsylvania law will show that our rule is not

> one of absolute liability, but rather, of a very strict standard of care to ascertain the truth of the published matter. (Citations and footnote omitted)
>
> *Id.* at 192, 8 A.2d at 307.

Thus, it would appear that long before the First Amendment considerations were raised, the common law of this jurisdiction had determined that the law of libel should require negligence or willful misconduct. *See Rosenbloom v. Metromedia, Inc., supra* at 87 n.13; *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 410 N.3 (E.D. Pa. 1983); *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 178-81, 191 A.2d 662, 668-69 (1963); *Williams v. Kroger Grocery & Baking Co.*, 337 Pa. 17, 19, 10 A.2d 8, 9 (1940); *Wharen v. Dershuck*, 264 Pa. 562, 566, 108 A.18, 19-20 (1919); *Clark v. North American Co.;* 203 Pa. 346, 352, 53 A. 237, 239 (1902); *Neeb v. Hope*, 111 Pa. 145, 151-52, 2 A, 568, 570-71 (1885).[12]

We are mindful that the former conditional privileges recognized under our law have lost their significance in the wake of *New York Times* and *Gertz*. If a private figure plaintiff is to maintain any cause of action at all, he must minimally establish the negligence on the part of the publisher. In so doing, "he has by that very action proved any possible conditional privilege was abused." Restatement (Second) of Torts, Topic 3, Title A, Special Note, at 259 (1977); *see also Nevada Independent Broadcasting Corp. v. Allen*, ____Nev. ____, 664 P.2d 337, 342-343 (1983).

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12. Moreover, the requirement of fault has been codified in Pennsylvania law since 1901. 42 Pa. C.S. §8344 (originally enacted in Act of April 11, 1901, P.L. 74 §3, 12 P.S. §1583) provides:

> Malice or negligence necessary to support award of damages
>
> In all civil actions for libel, no damages shall be recovered unless it is established to the satisfaction of the jury, under the direction of the court as in other cases, that the publication has been maliciously or negligently made, but where malice or negligence appears such damages may be awarded as the jury shall deem proper.

B.

The core of the reasoning of both the trial court and instant appellees is that the *Gertz* prohibition against strict liability necessarily requires that the plaintiff must have the burden of proving the falsity of the matter. This proposition does not logically flow, nor is it consistent with the concern sought to be addressed by the *Gertz* rule. The concept of fault as developed in the *Gertz* decision is not synonymous with the burden of proof of truth or falsity. The *Gertz* Court wished to avoid the possibility that a publisher may be held liable for defamation even though he took every conceivable precaution to ensure the accuracy of the offending statement prior to its dissemination. *Id.* at 346. Under the law of this Commonwealth there is no liability for civil libel unless plaintiff can at least establish that the dissemination occurred as a result of lack of due care. 42 Pa. C.S. §8344; *Rosenbloom, supra* at 87 n.13; *Zerpol Corp. v. DMP Corp., supra* at 410 n.3; *Purcell v. Westinghouse Broadcasting Co., supra* at 178-81, 191 A.2d at 668-69; *Williams v. Kroger Grocery & Baking Co., supra* at 19, 10 A.2d at 9; *Wharen v. Dershuck, supra* at 566, 108 A. at 19-20; *Clark v. North American Co., supra* at 352, 53 A. at 239. A plaintiff, even though benefitting from the presumption of falsity, must nevertheless show that defendant acted maliciously or negligently. 42 Pa. C.S. §8344; *Rosenbloom, supra* at 87 n.13; *Zerpol Corp. v. DMP Corp., supra* at 410 n.3; *Purcell v. Westinghouse Broadcasting Corp., supra* at 178-81, 191 A.2d at 668-69; *Williams v. Kroger Grocery & Baking Co., supra* at 19, 10 A.2d at 9; *Wharen v. Dershuck, supra* at 556, 108 A. at 19-20; *Clark v. North American Co., supra* at 352, 53 A. at 239. Restated, under our law the inability of the publisher to overcome the presumption of falsity of the defamatory statement will not insure recovery by the plaintiff. The recovery is dependent upon plaintiff's ability to establish malice or negligence on the part of the

publisher in disseminating the defamatory falsehood.[13] *See* 42 Pa. C.S. §8343(a)(7); *Corabi, supra* at 452 N.10, 453, 273 A.2d at 899, n.10; *Sciandra v. Lynett, supra* at 601, 187 A.2d at 589; *McAndrew v. Scranton Republican Pub. Co., supra* at 515, 72 A.2d at 785; *Montgomery v. Dennison, supra* at 262-64, 69 A.2d at 524-25.

We are satisfied that Pennsylvania law makes a constitutionally acceptable accommodation between the freedom of expression required by the First Amendment and our law of civil libel for compensatory damages brought by a private individual to redress defamatory falsehood. Strict liability is a policy determination that injury flowing from a set of circumstances will be compensable regardless of the blamelessness of the conduct of the defendant. The prohibition of *Gertz* restrains a state from attempting to protect its private citizens

13. In a rather circuitous argument, appellees contend that falsity is inextricably bound up with proof of fault. Appellees assert that to prove fault the plaintiff in fact must demonstrate the falsity of the matter. While in some instances the plaintiff may elect to establish the patent error in the material to demonstrate the lack of due care in ascertaining its truth, it does not necessarily follow that negligence of the defendant can only be shown by proving that the material is false. A plaintiff can demonstrate negligence in the manner in which the material was gathered, regardless of its truth or falsity. In such instance the presumption of falsity will prevail unless the defendant elects to establish the truth of the material and thereby insulate itself from liability. Where it is necessary to prove falsity to establish the negligence of the defendant, it is then the burden of the plaintiff to do so. The would appear to be a situation contemplated by former Chief Justice Roberts in his concurring opinion in Moyer v. Phillips, 462 Pa. 395, 404, 341 A.2d 441, 445 (1975) (Roberts, J., concurring, joined by Nix, J.). There it is suggested that "as a practical matter, the plaintiff will find it necessary to prove the falsity of the statement in order to establish the necessary element of fault; to this extent, the defendant is relieved of the burden of proving truth as a defense. *Id.* at 407-08, 341 A.2d at 447. That proposition will not, of course, hold true in all cases. Where negligence can be established without a demonstration of the falsity of the material, there is no additional obligation upon the plaintiff to prove the falsity of the material.

from defamatory falsehood causing injury to reputation by allowing compensatory damages without predicating the recovery on a showing of some wrongdoing on the part of the publisher. To assess the liability solely on the basis that the published defamatory utterance was erroneous would offend the "breathing space" that free debate requires. As we understand the thrust of the *Gertz* reasoning, it would not offend the principles articulated therein to place the burden of proving truth upon a defendant as long as the recovery is dependent upon the plaintiff's ability to establish the defendant's willful or negligent conduct in publishing the defamatory matter.

Our conclusion is bolstered by the fact that the *Gertz* holding adopted the view of the dissenters in *Rosenbloom, supra* at 64 (Harlan, J., dissenting); *id.* at 86-87 (Marshall, J., dissenting, joined by Stewart, J.), that the States are free to develop their own standards of liability for media defendants so long as they do not impose liability without fault. *See Gertz, supra* at 339, 347. In *Rosenbloom*, Pennsylvania libel law was under scrutiny and the dissenters were satisfied that their standard had not been violated. Although it was clear that the *Rosenbloom* Court was aware of the Pennsylvania requirement placing the burden of proving truth upon the defendant, nonetheless, neither dissenting opinion equated that allocation with strict liability. In fact, Justice Marshall plainly stated that Pennsylvania, unlike many other jurisdictions, did *not* apply a liability-without-fault standard. *Id.* at 87 n.13 (Marshall, J. dissenting). Moreover, the plurality which would have required the actual malice standard at no point suggested that Pennsylvania law attempted to impose liability without fault.

What the appellee is in essence arguing is that, even though the media publishes or reports maliciously or negligently a defamatory statement injurious to the reputation of a private citizen, it should be insulated from liability unless the plaintiff can affirmatively demonstrate the falsity of the statement. We find nothing in the Supreme Court decisions that would suggest such a result. The "breathing space" requirement of the First Amendment has not been extended, nor do we believe it can be reasonably extended, to condone or to encourage irresponsible conduct by the media in its exercise of informing the public of newsworthy events. Nor can we conceive of a legitimate constitutionally protected interest in condoning the media's malicious or negligent discharge of this responsibility. Free debate will not be encouraged by allowing it to become the forum for malicious or negligent abuse of the reputation of those involved in the controversy. The right to critize must carry some degree of responsibility, particularly where it may jeopardize the reputation of a private citizen.

We note further that a media defendant in a civil libel action is given even greater protection under our statutory law. In addition to the privilege to communicate matters of public interest and concern without fear of liability for erroneous information disseminated without negligence or malice, a newspaper publisher is privileged to withhold the identity of sources of information. The Pennsylvania Shield Law, 42 Pa. C.S. §5942(a), provides that:

> (a) General rule.—*No person* engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, *shall be required to disclose the source* of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

This statute has been interpreted broadly. *See, e.g., Lal v. CBS, Inc.*, 726 F.2d 97, 100 (3d Cir. 1984); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 278 (3d Cir.

1980); *In Re Taylor*, 412 Pa. 32, 40, 193 A.2d 181, 185 (1963). There, sources are excludable whether or not they contain the identity of sources actually used by the newpaper since the identity of all persons named or implicated in these sources is also included within the protection of the "shield law". *Lal v. CBS, Inc., supra* at 100; *Steaks v. Deaner, supra* at 278; *In Re Taylor, supra* at 40, 193 A.2d at 185.[14]

As a consequence of this greater protection to the media defendant provided by the "shield law", the plaintiff in a civil libel action is restricted in his ability to prove the falsity of the defamatory statement. He is denied access to the sources of information on which the statement is based. The defendant, who does possess that information is therefore in a better position to prove the truth of the defamatory statement. Thus this additional protection to a media defendant and the resulting impediment imposed upon the plaintiff in seeking to establish the falsity of the statements provides a further justification for maintaining our current practice of requiring the defendant to prove truth in defense of such a suit.

C.

For the foregoing reasons we hold that in a libel suit brought by a private individual for compensatory damages resulting from the defamatory material, the presumption of falsity remains and the defendant has the option of proving truth as an absolute defense to the action. The trial court's instruction to the contrary was error and the resulting verdict cannot be allowed to stand. Since the verdict was a general one we are unable to ascertain whether the jury found for the defendants because of its conclusion that the plaintiff had failed to es-

14. It must be noted that the shield law is designed to protect the confidentiality of the source; it was never intended to be interpreted as insulating the publisher from its negligence or actual malice.

tablish the falsity of the defamatory statements or whether the verdict reflects a finding that defendant was not negligent in publishing the material. The latter reason, of course, would have been a proper basis for the verdict, but the former reason is not in accordance with our law. Accordingly, the judgment of the trial court is reversed and a new trial is awarded as to the claim for compensatory damages.

III.

Since we are remanding the cause for a new trial on compensatory damages, it is also necessary to review appellant's assertion that the trial court erred in withdrawing from the jury's consideration the punitive damage issue. The trial court ruled that the appellant had presented insufficient evidence of the reporter's "actual malice" at trial so as to raise a triable issue of fact. We agree.

We should note that the *Gertz* decision has raised considerable controversy concerning whether it foreshadows the total abolition of punitive damage awards in defamation cases.[15] In holding unconstitutional the awarding of presumed or punitive damages where defamatory publications are negligently published, the *Gertz* Court reasoned that the potential for large jury verdicts, completely unrelated to the actual injury suffered by the victim, might have a chilling effect or act as a prior

15. Some commentators believe that *Gertz* indicates the United States Supreme Court will ultimately abolish punitive damage in defamation cases. *See, e.g.*, Robertson, *Defamation and the First Amendment: In Praise of Gertz v. Robert Welch, Inc.*, 54 Tex. L. Rev. 199, 215 (1976); Comment, 28 Vand. L. Rev. 887, 8897 (1975).

Other commentators have concluded that *Gertz* did not in itself abolish punitive damages but merely limited their availability. *See, e.g.*, Frakt, *The Evolving Law of Defamation: New York Times Co. v. Sullivan to Gertz v. Robert Welch, Inc. and Beyond*, 6 Rut.-Cam. L. J. 471, 507 (1975); Comment, 6 Loyola University Law J. 256, 267 (1975).

restraint of free expression. *Gertz, supra* at 350-51. Further, the Court surmised that the doctrine of presumed damages and the unabridged discretion conferred upon juries to award punitive damages, bearing no relationship to the injury suffered, invites juries to punish the expression of unpopular opinion rather than effectuate any legitimate social goal. *Id.* at 350-51. Nonetheless, a number of courts have considered whether *Gertz* presaged the abolition of punitive damages and have concluded that it did not.[16] We are satisfied that under the present law as articulated by the United States Supreme Court there has not been a sufficiently definitive directive to cause us to abandon the long standing practice in this jurisdiction of allowing punitive damages in the appropriate case.

The *Gertz* decision did make it clear that the negligent standard of fault would not be a sufficient basis for the allowance of punitive damages. To justify punitive damages, the plaintiff is called upon to satisfy the "actual malice" test. *Gertz v. Robert Welch, Inc., supra* at 350; *Levine v. CMP Publications, Inc.*, 738 F.2d 660, 674 (5th Cir. 1984); *Braun v. Flynt*, 726 F.2d 245, 256 (5th Cir.), *cert. denied*, ____, U.S. ____, 105 S. Ct. 252 (1984); *Hunt v. Liberty Lobby*, 720 F.2d 631, 650 (11th Cir. 1983); *Golden Bear Distributing Systems of Texas, Inc.*, 708 F.2d 944, 947 (5th Cir. 1983); *Maheu v. Hughes Tool Co.*, 569 F.2d 459, 479 (9th Cir. 1977); *Appleyard v.*

16. Hunt v. Liberty Lobby, 720 F.2d 631 (11th Cir. 1983); Maheu v. Hughes Tool Co., 569 F.2d 459 (9th Cir. 1977); Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976); Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir. 1976), Carson v. Allied News Co., 529 F.2d 206 (7th Cir.,1976), Davis v. Schuchat, 510 F.2d 731 (D.C. Cir., 1975); Selby v. Savard, 137 Ariz. 222, 655 P.2d 342 (1982); Roemer v. Retail Credit Co., 44 Cal. App. 3d 926, 932, 119 Cal. Rptr. 82, 85 (1975); Fopay v. Noveroski, 31 Ill. App. 3d 182, 198, 334 N.E. 2d 79, 92 (1975); Embrey v. Holly, ____Md. ____, 442 A.2d 966 (1982); Newspaper Publishing Corp. v. Burke, 216 Va. 800, 224 S.E.2d 132, 136 (1976) Calero v. Del Chemical Corp., 68 Wis. 2d 737, 228 N.W.2d 737, 747 (1975).

Transamerican Press, Inc., 539 F.2d 1026, 1030 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Buckley v. Littell*, 539 F.2d 882, 897 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Carson v. Allied News Co.*, 529 F.2d 206, 214 (7th Cir. 1976); *Davis v. Schuchat*, 166 U.S.App. D.C. 351, 357 510 F.2d 731, 737 (1975). We therefore turn to the question as to whether, upon this record, the trial court was correct in concluding that the evidence was insufficient to establish "actual malice". After a thorough review of the record, we are satisfied that the trial court's decision in this regard was correct.

In assessing the propriety of the trial court's withdrawal of the issue from the jury, we are mindful that such a ruling should be entered only in a clear case. *Hefferman v. Rosser*, 419 Pa. 550, 215 A.2d 655 (1966); *Howard Express Co. v. Wile*, 64 Pa. 201 (1870). The publisher's hatred, spite, hostility or deliberate intention to harm the plaintiff is not sufficiently probative of his knowledge of falsity or awareness of probable falsity so as to allow its admissibility where "actual malice" is at issue, but once established, the elements heretofore enumerated would be admissible. *Cf. Greenbelt Coop. Publishing Ass'n. v. Bressler, supra* at 10-11. As has been suggested, such testimony would invite a jury to improperly find a defendant liable where he acted with a guilty heart rather than a guilty mind. Also, it is axiomatic that a publisher's failure to investigate in itself is insufficient to establish "actual malice", *St. Amant v. Thompson, supra* at 732-33; *New York Times Co. v. Sullivan, supra* at 287-88; *Hunt v. Liberty Lobby, supra* at 643; *Brewer v. Memphis Publishing Co., Inc.*, 626 F.2d 1238, 1258 n.26 (5th Cir.,1975); *New York Times v. Conner*, 355 F.2d 567, 577 (5th Cir. 1966). So too, errors of judgment or interpretation as opposed to errors of historical fact have been held to be insufficient to create a jury issue of "actual malice". *Time v. Pape*, 401 U.S. 279, 290 (1971).

"Actual malice" can be established either by proving the publication was made with the knowledge of the fal-

sity of its content or with reckless disregard of whether it was false or not. *Rosenblatt v. Baer*, 384 U.S. 75, 84 (1966); *New York Times Co. v. Sullivan, supra*. When the first alternative is relied upon, the plaintiff must show not only the falsity of the statement but, in addition, it is the plaintiff's responsibility to establish the defendant's knowledge of that falsity at the time of publication.

In this context it must be noted that the presumption of falsity available to the plaintiff where the negligent standard is applicable is of no assistance in meeting the burden of proving "actual malice" under this theory. The Supreme Court has made it clear that a presumption may not be used to satisfy the fault element of the cause of action. It is also to be noted that under our traditional law such an approach would not be allowed. We have long recognized the evidentiary principle that a presumption may not be built upon a presumption. *Collins v. Hand*, 431 Pa. 378, 246 A.2d 398 (1968); *Auerbach v. Philadelphia Transportation Co.*, 421 Pa. 594, 221 A.2d 163 (1966); *Neely v. The Provident Life and Accident Insurance Co.*, 322 Pa. 417, 185 A. 784 (1936); *Philadelphia City Passenger Railway Co. v. Henrice*, 92 Pa. 431 (1880); *Douglas v. Mitchell's Executor*, 35 Pa. 440 (1860). In this instance it would require presuming not only that the content was false, but also that the defendant at the time of publication knew of that falsity. This is the clearest type of double presumption that we have rejected. *Cf. Collins v. Hand, supra; Auerbach v. Philadelphia Transportation Co., supra*.

In the instant matter there was no basis for the jury to have concluded that the publication was made with the knowledge of the falsity of its content. While the plaintiff attempted to show that the dissemination was made with reckless disregard of the truth of its content, it is equally apparent that a jury issue was not created under the clear and convincing test required for such an award of damages. *Bose Corp. v. Consumers Union of*

U.S., Inc., supra at ____n.30, 85 L. Ed.2d at 526 n.30; *Gertz v. Robert Welch, Inc., supra* at 342; *St. Amant v. Thompson, supra* 731; *Garrison v. Louisiana, supra* at 74; *New York Times v. Sullivan, supra* at 280; *Levine v. CMP Publications, Inc., supra* at 674;*Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 538 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983); W. Prosser, *Torts* 771-772, 821 (4th ed. 1971). Thus the trial court properly withdrew that question from the jury's consideration. *Hefferman v. Rosser*, 419 Pa. 550, 215 A.2d 655 (1966); *Thomas v. Tomay*, 413 Pa. 270, 196 A.2d 740 (1964); *Greet v. Arned Corp.*, 412 Pa. 292, 194 A.2d 343 (1963); *Luterman v. Philadelphia*, 396 Pa. 301, 152 A.2d 464 (1959); *Miller v. Montgomery*, 397 Pa. 94, 152 A.2d 757 (1959); *Hepler v. Hammond*, 363 Pa. 355, 69 A.2d 95 (1949).

IV.

Accordingly, the order of the trial court is reversed and a new trial is awarded. The new trial will be confined to a determination of defendant's liability and the assessment of compensatory damages if the liability issue is decided in favor of the plaintiff.

Mr. Justices Larsen and McDermott did not participate in the consideration and decision of this case.

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APPENDIX 2

MAURICE S. HEPPS, et al.	:	In the Court of
	:	Common Pleas
	:	Chester County,
	:	Pennsylvania
- *vs* -	:	
	:	
PHILADELPHIA NEWSPAPERS, INC.	:	No. 36 May Term, 1976
WILLIAM ECENBARGER	:	
and WILLIAM LAMBERT	:	Civil Action — Law

OPINION

By SUGERMAN, *J.*

The instant "private figure" libel action was commenced by the Plaintiffs against Philadelphia Newspapers, Inc., the publisher of the Philadelphia Inquirer ("Inquirer"), and two of its reporters, William Ecenbarger and William Lambert. We need not recite the facts underlying the action as they are set forth at length in *Hepps v. Philadelphia Newspapers, Inc.*, 3 D. & C. 3d 693 (Ches. Co. 1977), an Opinion filed by the writer in response to a pre-trial Motion for discovery.

Suffice it to note that in a series of five "investigative" articles, published by the Inquirer, the Defendant-reporters linked the individual and corporate Plaintiffs to certain named "underworld" figures and to organized crime generally.

The case was tried to a jury for a period of nearly six weeks and on July 13, 1981, the jury returned a general verdict in favor of all defendants. The Plaintiffs filed a timely Motion for a new trial, and following argument thereon, we denied the same. The Plaintiffs thereupon

appealed to the Supreme Court of Pennsylvania[1], and we write pursuant to the mandate of Pa. R.A.P. 1925(b).

Upon our receiving notice of the Plaintiffs' appeal, we directed them to serve upon us a Statement of matters complained of on appeal ("Statement"): Pa. R.A.P. 1925(a). The Plaintiffs have served such Statement upon us, setting forth four issues, all essentially relating to the Court's final instructions to the jury. We address the issues in turn.

1

The elements of a cause of action for defamation and the respective burdens of proof have for some years been codified in Pennsylvania and are presently found in the Judicial Code[2] at 42 Pa. C.S.A. §8343. The latter section provides the following:

"§8343. Burden of proof

(a) Burden of plaintiff. — In an action for defamation, the plaintiff has the burden of proving, when the issue is properly raised:

(1) The defamatory character of the communication.

(2) Its publication by the defendant.

(3) Its application to the plaintiff.

(4) The understanding by the recipient of its defamatory meaning.

1. As will be seen *infra*, we declared a statute of Pennsylvania unconstitutional. Accordingly, the Supreme Court of Pennsylvania is vested with exclusive jurisdiction of such appeals. 42 Pa. C.S.A. §722(7).

2. Act of 1976, July 9, P.L. 586, No. 142, §2, effective June 27, 1978. The Judicial Code was of course in effect at the time of the instant trial.

(5) The understanding by the recipient of it as intended to be applied to the plaintiff.

(6) Special harm resulting to the plaintiff from its publication.

(7) Abuse of a conditionally privileged occasion.

(b) Burden of defendant. — In an action for defamation, the defendant has the burden of proving, when the issue is properly raised:

(1) The truth of the defamatory communication.

(2) The privileged character of the occasion on which it was published.

(3) The character of the subject matter of defamatory comment as of public concern." (Emphasis added).

Prior to instructing the jury, at the conclusion of the trial, we declared 42 Pa. C.S.A. §8343(b)(1) which places the burden of proving the truth of a defamatory publication upon the defendant, to be unconstitutional as in violation of the First Amendment to the Constitution of the United States. More specifically, we ruled that in a libel action brought by a "private figure"[3] against a media defendant, as at bar, the First Amendment requires that the *plaintiff* bear the burden of proving the *falsity* of the defamatory publication, and we so instructed the jury (N.T. 3848). Thus, we added an element to the Plaintiffs' cause of action: proof of the falsity of the publication. Our ruling was based upon our interpretation of *Gertz v. Robert Welch, Inc., supra,* and de-

3. *See, e.g., Time, Inc. v. Firestone,* 424 U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976); *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974) (hereinafter, "*Gertz*"), *Avins v. White,* 627 F. 2d 637 (3d Cir. 1980).

cisions of two United States Circuit Courts of Appeal, discussed *infra*.

The Plaintiffs contend on appeal that our ruling was erroneous and base this contention upon three grounds: (a) the Supreme Court of Pennsylvania, in *Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A. 2d 899 (1971) (hereinafter, "*Corabi*"), *citing Restatement of Torts* §613 (1938), specifically held that the burden of proving the truth of a communication is upon a libel defendant, and this Court, as a court of inferior jurisdiction, is bound by the holding in *Corabi*; (b) quite apart from *Corabi*, 42 Pa. C.S.A. §8343(b)(1) is constitutional; and (c) *regardless* of whether the latter section of the Judicial Code is constitutitional, the Defendants have waived the right to challenge the constitutionality of the statute by tailing to follow the notice requirements of Pa. R.C.P. No. 235. We examine each of these grounds briefly.

(a)

As observed, the Plaintiffs contend that the issue is controlled by the decision of the Supreme Court of Pennsylvania in *Corabi*, and that as the issue before us is the same as that confronted by the Court in *Corabi*, and as we are a court of inferior jurisdiction, we are bound to follow *Corabi*. Certainly we are aware that a majority opinion of the Supreme Court of Pennsylvania is binding precedent upon the courts of Pennsylvania. *Commonwealth v. Mason*, 456 Pa. 602, 322 A. 2d 357, 358 (1974), and we are not free to overrule the decisional law enunciated by that Court, *Hillbrook Apartments, Inc. v. Nyce Crete Co.*, 237 Pa. Super 565, 573, 352 A. 2d 148, 152 (1975). *And see*, 10 *P.L.E.* Courts §81.

The Plaintiffs at the same time concede, as they must, that *all* Pennsylvania Courts, including of course the courts of common pleas, are bound to follow the decisions of the Supreme Court of the United States on all questions involving the construction and interpretation

of the Constitution of the United States. *Commonwealth v. Ware*, 446 Pa. 52, 284 A. 2d 700 (1971), *cert. den.* 406 U.S. 910, 92 S. Ct. 1606, 31 L. Ed. 2d 821 (1972); *Commonwealth ex rel. Banks v. Hendrick*, 430 Pa. 575, 243 A. 2d 438 (1968)[4]. With these principles in mind, it is appropriate to briefly examine *Corabi* in order to determine the nature of the issue it *did* decide.

In *Corabi*, the plaintiff, a public figure, instituted a libel action against Curtis Publishing Company, seeking damages for the publication of an article in the Saturday Evening Post alleged to be defamatory. A jury returned a verdict in favor of the plaintiff and the defendant, Curtis, thereupon filed a motion for judgment notwithstanding the verdict, on the ground, *inter alia*, that the plaintiff failed to show by clear and convincing evidence the falsity of the article in question. The lower court denied the motion and the defendant appealed, essentially asserting before the Supreme Court that permitting a public figure libel plaintiff to recover against a media defendant without a clear and convincing showing of the falsity of the publication in suit would violate the

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4. Speaking to the question of the force of decisions of the United States Court of Appeals for the Third Circuit, interpreting the Constitution of the United States, our Supreme Court has said:

> "When the United States Court of Appeals for the Third Circuit has held certain practices or procedures to violate federal constitutional rights, its decision will be accepted and followed by the courts of this Commonwealth until the United States Supreme Court has spoken on the issue. *Commonwealth v. Negri*, 419 Pa. 117, 213 A. 2d 670 (1965). See also *Commonwealth v. Bennett*, 445 Pa. 8, 282 A. 2d 276 (1971)."

Schreiber v. Republic Intermodal Corp., 473 Pa. 614, 620 n. 5, 375 A. 2d 1285, 1288 n. 5 (1977). *And see, Commonwealth v. Whitner*, 241 Pa. Super. 316, 322 n. 9, 361 A. 2d 414, 417 n. 9 (1976):

> "On questions of constitutional proportions, considerations of comity require that decisions of the Third Circuit be treated as binding authority, unless and until the United States Supreme Court speaks to the contrary. [Citations omitted]."

defendant's "rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States". *Id.* at 439, 273 A. 2d at 903.

The Court squarely addressed the issue and held, adversely to the defendant,

> ". . . counsel for Curtis claimed that, should the constitutional privilege [under the First and Fourteenth Amendments to the Constitution of the United States] be applicable, *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), and its progeny placed the burden on plaintiff to prove falsity rather than requiring defendant to prove truth. We do not agree, but such a contention does warrant that we re-examine the bases of some aspects of our law of libel in Pennsylvania in the light of the constitutional limitations placed thereon.
>
> 'It is fundamental in Anglo-Saxon jurisprudence that any man accused of wrong-doing is presumed innocent until proven guilty. This is the rule not only in our criminal courts but in the ordinary affairs of life:' *Montgomery v. Dennison*, 363 Pa. 255, n. 2, at 263, 69 A. 2d 520 (1949). Because of this fundamental premise, '*in actions for defamation, the general character or reputation of the plaintiff is presumed to be good:*' 53 C.J.S. Libel and Slander §210, at 317 (1948); *accord, Klumph v. Dunn*, 66 Pa. 141 (1871); *Chubb v. Gsell*, 34 Pa. 114 (1859).
>
> *As one consequence, as a general rule the falsity of defamatory words is presumed:* 53 C.J.S. Libel and Slander §217 (1948). See *Hartranft v. Hesser*, 34 Pa. 117 (1859). Nevertheless, although ordinarily in order to be actionable words must be false, falsity is *not* an element of a cause of action for libel in Pennsylvania. Rather the opposite of falsity, truth, is a complete and absolute defense to a civil action for libel: *Schnabel v. Meredeth*, supra; *Kilian v. Doubleday & Co., Inc.*, 367 Pa. 117, 79 A. 2d 657 (1951); Restatement of Torts §582 (1938). See also, *Matson v. Margiotti*, 371 Pa. 188, 88 A. 2d 892 (1952); *Montgomery v. Dennison*, supra; and the Act of April 11, 1901, P.L. 74, §2, 12 P.S. 1582. And the burden of proving the same rests upon the defendant: *Montgomery v. Dennison*, supra; *McAndrew v. Scranton Republican Pub. Co.*, 364 Pa. 504, 72 A. 2d 780 (1950); 53 C.J.S. Libel and Slander §217; Restatement of Torts §613, comment h (1938). Moreover, it is manifestly the fair thing to place upon the defendant the burden of proving truth: *Montgomery v. Dennison*, supra, n. 2 at 263; 9 Wigmore, Evidence § 2486, at 276 (3d ed. 1940)." *Id.* at 448-50, 273 A. 2d at 907-8. (Footnotes omitted). (Emphasis added).

As is thus readily apparent, this aspect of the decision in *Corabi* makes clear that (1) the Court was interpreting the Constitution of the *United States*, and (2) as the common law presumed a libel plaintiff's reputation to be good, and thus presumed the falsity of a defamatory publication, the burden of proving the *truth* of a defamatory publication was properly placed upon a defendant.

We consider the second of these postulations *infra*. With respect to the first, suffice it to note, in response to the Plaintiffs' contention that *Corabi* is binding upon us, that if the United States Supreme Court has ruled upon the issue, it is the pronouncement of *that* Court, and not *Corabi* that is binding upon us.

(b)

As we have observed, the Plaintiffs next contend that quite apart from *Corabi*, the placement of the burden of proving truth upon a media defendant as required by 42 Pa. C.S.A. §8343(b)(1), is constitutional within the framework of the First Amendment. We, of course, disagree and turn to an examination of the decisions that

underlie our finding 42 Pa. C.S.A. §8343(b)(1) unconstitutional.

In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964) (hereinafter, "*New York Times*"), the Court held quite clearly that a public official bears the burden of proving falsity "with convincing clarity". *Id.* at 279-80, 285-86, 84 S. Ct. at 725-26, 728-29, 11 L. Ed. 2d at 706, 710[5]. *See also, Cox Broadcasting Corp. v. Cohen, supra; Garrison v. Louisiana*, 379 U.S. 64, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964); *Goldwater v. Ginzburg, supra.*

It is therefore beyond peradventure that the burden of proving falsity is upon libel plaintiffs who are public officials or public figures[6], and the Plaintiffs do not suggest otherwise. The Plaintiffs assert, however, that since *Corabi* was decided in 1971, *no* decision of the Supreme Court of the United States has squarely held that the First Amendment precludes the states from placing the burden of proving truth upon a media defendant in a "private" figure libel case. *Plaintiffs' Memorandum*, at 7. The Plaintiffs do concede, however, that "certain courts

5. In *New York Times*, the Court held that the Constitution of the United States prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with " 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not". *Id.* at 279-80, 84 S. Ct. at 726, 11 L. Ed. 2d at 706. Such rule obviously places the burden of proving falsity upon a public official. *See*, R. Sack. *Libel, Slander and Related Problems*, III.3.2, at 135 (1980) (hereinafter, "*Sack*"). *See also*, to the same effect, *Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 95 S. Ct. 1029, 43 L. Ed. 2d 328 (1975); *Goldwater v. Ginzburg*, 414 F. 2d 324 (2d Cir. 1969), *cert. den.*, 396 U.S. 1049, 90 S. Ct. 701, 25 L. Ed. 2d 695 (1970), *reh. den.* 397 U.S. 978, 90 S. Ct. 1085, 25 L. Ed. 2d 274 (1970); *Pape v. Time, Inc.*, 294 F. Sup. 1087 (N.D. Ill. 1969), *rev'd on other grounds*, 419 F. 2d 980 (7th Cir. 1969), *rev'd*, 401 U.S. 279, 91 S. Ct. 633, 28 L. Ed. 2d 45 (1971).

6. The holding of *New York Times* was extended to "public figure" plaintiffs in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967).

throughout the nation" have construed *Gertz* to so hold. *Plaintiffs' Memorandum* at 8.

In *Gertz*, decided nearly three and one-half years *subsequent* to *Corabi*, the Supreme Court of the United States said:

> "We hold that, *so long as they do not impose liaiblity without fault*, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a more equitable boundary between the competing concerns involved here. *It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation.*" *Id.* at 347-48, 94 S. Ct. at 3010-11, 41 L. Ed. 2d at 809-10. (Emphasis added).

Thus, in language the essence of clarity, the Supreme Court of the United States has held that the First Amendment prohibits the imposition of liability upon a media defendant without fault in a private figure libel action. *Id.* And as *Corabi* points out, "as a general rule the falsity of defamatory words is presumed . . ." *Id.* at 449, 273 A. 2d at 908. We reiterate, as we did at the time we declared 42 Pa. C.S.A. §8343(b)(1) to be constitutionally infirm, that a rule, as enunciated in *Corabi* that places the burden of proving truth upon a defendant, when coupled with a presumption of falsity may result in the imposition of liaiblity without fault — precisely the result that *Gertz* forbids. Thus it is that when a trier of fact is unable to determine the truth or falsity of an assertion in a defamatory publication, he must render his decision *against* the party having the burden of proof. In such case, application of 42 Pa. C.S.A. §8343(b)(1), and the *presumption* of falsity, permits liability without fault.

In *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F. 2d 371 (6th Cir. 1981) *cert. granted*, 454 U.S. 962, 102 S. Ct. 500, 70 L. Ed. 2d 377 (1981), *cert. dismissed pursuant to Rule* 53, 454 U.S. 1130, 102 S. Ct. 984, 71 L. Ed. 2d 119 (1982), a "private figure" libel action, the plaintiff filed suit in Tennessee against a media defendant for defamation. The Tennessee courts at the date of trial, followed the common law as set forth in *Restatement of Torts* §§518, 613(2) and placed the burden of proving truth upon a defendant, as an affirmative defense. Although falsity was an element of a cause of action for defamation, *Id.* at §§558(a), 581A., once a publication was shown to be defamatory, falsity was presumed.[7] The trial court (United States District Court For The Western District of Tennessee) in *Wilson v. Scripps-Howard, supra,* instructed the jury in accordance with the Tennessee rule and placed the burden of proving truth upon the media defendant. *Id.* at 373.

The Court of Appeals first observed that the question of whether *Gertz* requires that the burden of proving falsity be upon a private figure libel plaintiff was one of first impression for Federal appellate courts. *Id.* at 374. The Court then specifically held that "fault" as that word was used in *Gertz* consists of *two* elements: carelessness *and* falsity. *Id.* at 375. Reversing the District Court, the *Wilson* Court said:

> "This common law allocation of the burden of proof is drawn into question by the constitutional prohibition against liability without fault established in *Gertz*, 418 U.S. at 347-48, 94 S. Ct. at 3010-3011. The language of *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964), and later cases makes clear that the burden of demonstrating the falsity of the defamatory statement rests on the plaintiff when the malice standard applies.

7. *Corabi*, as noted, follows this rule. *Id.* at 449, 273 A. 2d at 908.

See, e.g., Garrison v. Louisiana, 379 U.S. 64, 74, 85 S. Ct. 209, 215 13 L.Ed. 2d 125 (1964) (public official must establish that the utterance was false); *Rosenblatt v. Baer*, 383 U.S. 75, 84, 86 S. Ct. 669, 675, 15 L.Ed. 2d 597 (1966) (same).

The same rule requiring the plaintiff to prove falsity is required under the First Amendment in libel cases based on negligence or some other standard of fault of lesser magnitude than malice. The Supreme Court in stating that 'demonstration that an article was true would seem to preclude finding the publisher at fault,' *Time, Inc. v. Firestone*, 424 U.S. 448, 458, 96 S. Ct. 958, 967, 47 L. Ed. 2d 154 (1976), has suggested that falsity is an element of fault in defamation cases.

. . .

> The Supreme Court has said that before the status quo is changed judicially in libel cases by an award of money damages against the publisher, the First Amendment requires that the plaintiff prove fault. *Falsity is an element of fault under the First Amendment that should be proved and not presumed*. The District Court therefore erred in placing the burden on the defendant. As a matter of federal First Amendment law, the burden must be placed on the plaintiff to show falsity." *Id.* at 374-76. (Emphasis added).

Addressing the reason for its holding and interpretation of *Gertz*, the *Wilson* Court said:

> "In addition, a rule that places the burden of proving truth on the defendant permits the imposition of liability without fault in certain situations. '[W]hen the trier of fact is unable to determine the truth or falsity of a proposition of fact, he must render his decision against the party having the bur-

den of proof. Consequently, in a jury trial the judge by allocating the burden of proof decides each issue of fact which the jury is unable to decide.' *E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation* 70-71 (1956). When the jury is uncertain on the issue of the truth or falsity of the statement, as it may have been in the present case, it must find in favor of the plaintiff. A presumption of falsity thus permits liability without fault in the close case, in the case in which the jury is uncertain. *See County Court of Ulster County v. Allen*, 442 U.S.140, 99 S. Ct. 2213, 2224-30, 60 L. Ed. 2d 777 (1979), a criminal presumption case discussing the significant effect that burden-shifting presumptions may have on the outcome of a close case and requiring a close causal connection between the proved fact and the presumed fact. In libel and slander cases generally, there is no particular causal connection between the proved fact (the making of a derogatory statement) and the presumed fact (the falsity of the statement). There is no particular reason to presume falsity." *Id.* at 375-76.

While not binding upon us, the holding in *Wilson* is indeed persuasive insofar as it interprets *Gertz* and applies the latter to private figure libel actions.

In *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y. 2d 369, 397 N.Y.S. 2d 943, 366 N.E. 2d 1299 (1981), *citing Cox Broadcasting Corp. v. Cohn, supra*, the New York Court of Appeals held that in a public figure libel case, the burden is upon the plaintiff to prove the falsity of the publication. *Id.* at 1305. Shortly thereafter, the New York Supreme Court, Appellate Division, in *Fairley v. Peekskill Star Corp.*, 445 N.Y.S. 2d 156, ____ N.E. 2d ____ (1981), *citing Rinaldi, supra*, and *Wilson v. Scripps-Howard, supra*, as authority, held in a

private figure libel action that the burden of proving falsity was upon the plaintiff. *Fairley v. Peekskill*, 445 N.Y.S. 2d at 158, ____ N.E. 2d at ____.[8]

In *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A. 2d 688 (1976), the Maryland Court of Appeals following *Gertz*, adopted the negligence standard of fault in private figure libel actions and then said,

> "It is to be noted that under the negligence standard which we adopt here, truth is no longer an affirmative defense to be established by the defendant, but instead the burden of proving falsity rests

8. Addressing the dichotomy the Plaintiffs at bar endeavor to carve in stone — public figure v. private figure plaintiffs — the *Fairley* Court said:

> "The above instances of lack of defamatory meaning, however, are not the only deficiencies in the plaintiff's case. The plaintiff never demonstrated that questions of fact exist concerning the falsity of many of the statements.
>
> We note that at common law the defamed plaintiff had no such burden. The defendant was required to prove truth as a defense (see 1 Seelman, Law of Libel and Slander in New York, par 392). More recently, however, in cases against a media defendant, the defamed plaintiff has been required to prove falsity but only after he has been found to be a public official or a public figure. In *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y. 2d 369, 380, 397 N.Y.S. 2d 943, 366 N.E. 2d 1299, the Court of Appeals stated '[t]his requirement follows naturally from the actual malice standard. Before knowing falsity or reckless disregard for truth can be established, the plaintiff must establish that the statement was, in fact, false.' *We see no significant distinction where the plaintiff is held to be a private figure and the topic of the article is a matter of public concern*. In such cases the plaintiff is required to prove gross irresponsibility (see *Chapadeau v. Utica Observer Dispatch*, 38 N.Y. 2d 196, 199, 379 N.Y.S. 2d 61, 341 N.E. 2d 569) resulting in a defamatory falsity. Under such circumstances, proof of falsity is again naturally related to the standard of care. Thus, in a case with constitutional implications such as the one at bar, the defamed plaintiff must prove falsity, irrespective of his status (see *Wilson v. Scripps-Howard Broadcasting Co.*, 6 Cir., 642 F. 2d 371)." *Id.* at 158. (Emphasis added).

upon the plaintiff, since, under this standard, he is already required to establish negligence with respect to such falsity." 350 A. 2d at 698.

The same Court, in *General Motors Corporation v. Piskor*, 277 Md. 165, 352 A. 2d 810 (1976), a private figure defamation action, expounded upon its earlier holding in *Jacron:*

> "Little need be added here to what we said in *Jacron*, since, like that case, this is one of purely private defamation. There, we read *Gertz* as being applicable to defamation actions brought by private persons without regard to whether the subject matter was one of public or general interest. In adopting the *Gertz* principles as a matter of state law, we held that they applied to cases of slander and libel alike brought against non-media defendants. Accordingly, we held that the negligence standard set forth in Restatement (Second) of Torts §580B (Tent. Draft No. 21, 1975) must be applied in cases of purely private defamation. Under this negligence standard, truth is no longer an affirmative defense; instead, the burden of proving falsity rests upon the plaintiff. Further, fault, in cases of purely private defamation, must be established by the preponderance of the evidence.
>
> In conformity with what was then controlling state law, the trial of the defamation claim in this case proceeded on the premise of liability without fault, rather than upon some greater standard such as negligence. Since the *Gertz* and *Jacron* principles are equally applicable here, we hold that a new trial is required where the plaintiff shall be required to establish the liability of the defendant through proof of falsity and negligence by the preponderance of the

> evidence, and may recover compensation limited to actual injury as defined in *Gertz* and *Jacron*." *Id.* at ____, 352 A. 2d at 815. (Footnotes omitted).

Against this background, the United States District Court For the District of Maryland, in *Jenoff v. Hearst Corporation*, (D.C. Md. unreported), a private figure libel action, against a media defendant instructed the jury, in accord with *Jacron*, that the burden upon the plaintiff included the requirement that the plaintiff prove that the defamatory statements were false. The jury returned a verdict for the plaintiff.

Affirming this placement of the burden, the United States Court of Appeals For The Fourth Circuit said, in *Jenoff v. Hearst Corporation*, 644 F.2d 1004 (1981):

> "In a charge that was comprehensive, precise and correct in its definitions, and expressed throughout in simple language, the District Court instructed the jury as to the elements of defamation, the allocation of burdens of proof, and the method by which damages were to be proved and calculated. Particularly, the Court charged that to find for Jenoff they must believe that he had shown by a preponderance of the evidence that Hearst's publication of the statements was negligent, that the statements were false and defamatory, and that the statements caused Jenoff's injury. The verdict fulfilled these exactions." *Id.* at 1008.

We turn next to the decisions from Pennsylvania which were available to us at the date of our ruling. In *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (1980), a public figure libel case, the United States Court of Appeals For The Third Circuit, held, as was to be expected, that the plaintiff, as a public figure, must prove "with convincing clarity that the [media defendants] broadcast false statements knowing of their falsity or with reckless disregard of the truth". The Court then said, "There are

two elements to this standard: First [the plaintiff] must prove that at least some of the material contained in the broadcast was false. Second, it must prove that the defendants broadcast such material with [actual malice]" *Id.* at 274-75. In footnote 49, above, and *citing Corabi*, the Court observed, by way of dictum:

> "49. *Pennsylvania's placement of the burden of proving the truth of the communication on the defendant, Corabi v. Curtis Publishing Co., 441 Pa. at 449-50, 273 A. 2d at 908-09, would appear to be contrary to the constitutional limitations on state libel law enunciated by the Supreme Court. See, e.g., Gertz, 418 U.S. at 347 n. 10, 94 S. Ct., at 3010 (rejecting Justice White's view that it would be constitutional for a state to require libel defendants to prove the truth of an allegedly defamatory statement); New York Times,* 376 U.S. at 271, 84 S. Ct. at 721 ("Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth . . . and especially one that puts the burden of proving truth on the speaker."). Inasmuch as the district court concluded that there exists a genuine issue of fact regarding the truth of some of the broadcast material, 468 F. Supp. at 783, and because the defendants have not challenged the decision on this appeal, we have no occasion to review either the correctness of the district judge's decision or the constitutionality of Pennsylvania's placement of the burden of proof." *Id.* at 274-75. (Emphasis added).

It should be again noted that *Gertz* was a"private figure" case. As such, the presumed reliance upon its holding by the Court of Appeals would appear to apply to *all* libel cases, whether commenced by public or private figure plaintiffs. Of course, we are aware that dicta in a footnote

to an Opinion by the United States Court of Appeals For The Third Circuit is not binding upon us. Nevertheless, we were and remain persuaded by its logic.

We were next privy to the decision of the same Court in *Medico v. Time, Inc.*, 643 F.2d 134 (1981) *rehearing and rehearing en banc den.* 643 F.2d 134 (1981). In the Opinion in the latter case, authored by the same Circuit judge who wrote for the Court in *Steaks Unlimited, supra*, once again, by way of dictum, the Court said:

> "Although the common law placed the burden of proving truth on the defendant, this allocation may run afoul of recently announced constitutional principles. *See* note 38 *infra*. Because we dispose of the present case on the basis of the fair report privilege, we have no occasion to resolve this constitutional issue, or to consider whether Pennsylvania courts would continue to apply the republication rule to a newspaper account of defamatory remarks, *see* Part VII & note 42 *infra*." *Id.* at 137 n. 8.

And again:

> "40. Placement on the plaintiff of the burden of demonstrating that a privileged report was not fair and accurate traditionally distinguished the fair report privilege from the truth defense, in which defendant bore the burden of proving truth, *see Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 449-50, 273 A. 2d 898, 908-09 (1971). After *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), it is doubtful that a state can place the burden of proving truth on the defendant. *Gertz* held that a plaintiff in a defamation action must be required to demonstrate 'fault' on the part of defendant, *id.* at 347, 94 S. Ct. at 3010, and rejected Justice White's suggestion, offered in dissent, that a publisher may be required to prove the truth of a defamatory statement concerning a private individual, *id.* at

347 n. 10, 94 S. Ct. at 3010 n. 10. We have earlier questioned whether Pennsylvania's placement of the burden of proving truth on the defendant survives *Gertz, see Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 274 n. 49 (3d Cir. 1980), and at least one member of the Pennsylvania Supreme Court has expressed similar reservations, *see Moyer v. Phillips*, 462 Pa. 395, 341 A. 2d 441, 447 (1975) (Roberts, J., concurring). *But see*, Eaton, *supra* note 33, at 1381-86, 1429 [sic: n. 34; Eaton, *The American Law of Defamation Through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer*, 61 Va. L. Rev. 1349 (1976)] (*Gertz* tolerates common law rule of presuming falsity of defamatory publication, and placing on defendant burden of proving truth)." *Id.* at 146 n. 40.

Thus, although the Court of Appeals For the Third Circuit has not specifically reached the issue of the placement of the burden of proving truth or falsity, the Court left little doubt as to its view on the subject.

The Supreme Court of Pennsylvania has not squarely considered the issue since its pre-*Gertz* decision in *Corabi*. However, in *Moyer v. Phillips*, 462 Pa. 395, 341 A. 2d 441 (1975) in which the Court decided that a cause of action for libel survives the death of the defendant, Justice Roberts, concurring noted that at common law, the burdens of proving truth and privilege were quite heavy and generally required testimony from a defendant in order to defend the action. Consequently, Justice Roberts wrote, the legislature could quite properly single out a cause of action for libel to abate with the death of the defendant. However, Justice Roberts, joined by Justice Nix, noted:

> ". . . a substantial change in the law of defamation was wrought by the decision of the United States Supreme Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789

(1974). That case held that, as a matter of constitutional law, liability for defamation may not be imposed without some showing of fault, amounting at least to negligence, on the part of the defendant. Id. at 345, 94 S. Ct. at 3010; see Restatement (Second) of Torts §§580A. 580B (Tent. Draft No. 21, 1975). This change drastically shifts the burden of proof in defamation actions and thereby reduces the unusually heavy burden heretofore placed on defendants in such actions. In proving the necessary element of fault to make out his cause of action, the plaintiff will necessarily have to prove facts that would ordinarily negate the existence of a conditional privilege. Id. Topic 3, Special note, at 46-47. *Similarly, as a practical matter, the plaintiff will find it necessary to prove the falsity of the statement in order to establish the necessary element of fault; to this extent, the defendant is relieved of the burden of proving truth as a defense*. Id. §582, comment b., & §580B, comment i." *Id.* at 446-47 (Footnotes omitted) (Emphasis added).

Once again, while the concurring Opinions of two justices of the Supreme Court are not binding upon us, they are persuasive.

Finally, in *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. 475, 448 A. 2d 6 (1982), *pet. for allowance of appeal den.* Sept. 30, 1982, 301 Pa. Super. 475, 448 A. 2d 6 (1982)[9], a case involving a libel action by a police sergeant (public official) against a newspaper, Judge Spaeth, writing for a panel of the Superior Court of Pennsylvania and, citing the concurring Opinion of Justice Roberts in *Moyer v. Phillips, supra*, and the Decision of the Sixth Circuit in *Wilson v. Scripps-Howard Broadcasting Co., supra*, unequivocally placed the burden of proving falsity upon a libel plaintiff, without ref-

9. *Dunlap* was decided more than two years *subsequent* to our ruling instantly.

erence to the public figure-private figure dichotomy[10]. In doing so, Judge Spaeth wrote:

> "In our opinion *Moyer* undermines *Corabi* and its progeny, in both the Pennsylvania and federal courts. Moreover, we are persuaded that the plaintiff should have the burden of proving falsity for the reasons so carefully explained by . . . the Sixth Circuit in *Wilson v. Scripps-Howard Broadcasting Co.* [*supra*] . . ." *Id.* at 488, A. 2d at 13.

And as Judge Spaeth wrote in a footnote:

> "8. One commentator has cited *Moyer* as an example of a state court's express recognition of post-*Gertz* burdens of proof:
>
> Before 1964, truth was a 'defense' in defamation cases-which meant that falsity would be assumed unless the defendant pleaded affirmatively that his aspersion was true and then came forward at the trial with evidence of its truth. Once all the proof was in, the defendant had the burden of convincing the court that the disparagement was true. The revolution changed all this: the United States Supreme Court has, by implication, allocated an issue of falsity to the plaintiff by holding that plaintiffs have no cause of action unless they establish the defendants' fault. Public officials or public persons are required by *Times* and *Walker* to establish *Times* malice; and private persons are required by *Gertz* to establish at least negligence. These constitutional burdens requiring plaintiffs to demonstrate the defendants' fault make no sense unless the plaintiff shows that the disparagement was untrue. Statements of defamatory truth are not actionable as either libel or slander. Some state courts have expressly recognized this constitutional reallocation of the burdens

10. *Cf.* Concurring Opinion by Beck, J.

> on the truth issue [footnote citing *Moyer*, omitted]. *Morris on Torts* 350 (2d ed. 1980)." *Id.* at 488 n. 8, 443 A. 2d at 13 n. 8.

The Decision of the panel in *Dunlap* has twice been recently cited by the United States District Court For The Eastern District of Pennsylvania on the question of the burden of proving truth or falsity — under Pennsylvania law. While in no sense binding, and purely dictum, the Decisions should be noted.

In *Lal v. CBS, Inc.*, 551 F. Supp. 356 (E.D. Pa. 1982), Chief Judge Luongo observed in a footnote:

> "During oral argument, counsel for CBS directed the court's attention to the Pennsylvania Superior Court's recent decision in *Dunlap v. Philadelphia Newspapers, Inc.*, 448 A. 2d 6 (1982), wherein it was held that the burden of proving the truth of a publication may not constitutionally be placed upon a defendant in a defamation action. Hence, CBS argues under *Dunlap* that it is plaintiff's burden to prove that the broadcast was false. Although I predict that the Pennsylvania Supreme Court would reverse its prior decisions and follow *Dunlap* were it presented with the issue, I need not decide the point at this time. Irrespective of the placement of the burden of proof on the truth defense, an issue of fact would still remain as to whether the broadcast was true or false." *Id.* at 361 n. 3.

And in *Williams v. WCAU-TV*, 555 F. Supp. 198 (E.D. Pa. 1983), Judge Broderick agreed:

> "Capital Cities has also asserted that summary judgment should be granted it because its broadcast was substantially true. The Court is aware of the recent decision of Judge Spaeth of the Pennsylvania Superior Court in *Dunlap v. Philadelphia Newspapers, Inc.*, 448 A. 2d 6 (Pa. Super. 1982), holding that, in light of the Supreme Court's decision in

Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S. Ct. 2997, 41 L. Ed. 2d 789 (1974), the plaintiff in a defamation action bears the burden of showing the falsity of the publication giving rise to the action. We join with our colleague, Chief Judge Luongo, in predicting that the Pennsylvania Supreme Court will follow *Dunlap* when it is presented with the issue. *Lal v. CBS, Inc.*, 551 F. Supp. 356 at 361 n. 3 (E.D. Pa. 1982). See *Steaks Unlimited, Inc. v. Deaner* [*supra*]."

Other jurisdictions as well place the burden of proving falsity upon a libel plaintiff. *See, e.g., Cianci v. New Times Publishing Co.*, 639 F. 2d 54 (2d Cir. 1980) (public figure); *Goodrich v. Waterbury Republican-American, Inc.*, 188 Conn. 107, 448 A. 2d 1317 (1982) (private figure); *McIntire v. Westinghouse Broadcasting Co.*, 479 F. Supp. 808 (Mass. 1979) (public figure); *Mihalik v. Duprey*, ____ Mass. App. Ct. ____, 417 N.E. 2d 1238 (1981) (public figure); *Brown v. Beney*, 41 N.C. App. 636, 255 S.E. 2d 784 (1979) (private figure); *Mark v. Seattle Times*, 96 Wash. 2d 473, 635 P. 2d 1081 (1981) (private figure); *Sims v. Kiro, Inc.* 20 Wash. App. 229, 580 P. 2d 642 (1978) (private figure); *McHale v. Lake Charles American Press*, ____ La. App. ____, 390 So. 2d 556 (1980) (public figure).

Finally, we turn to the *Restatement (Second) Torts*, adopted and promulgated on May 19, 1976, subsequent to the Decision in *Gertz*.

Section 558 sets forth the elements of a cause of action for defamation:

"§558. Elements Stated

To create liability for defamation there must be:

(a) *a false and defamatory statement concerning another;*

(b) an unprivileged publication to a third party;

(c) fault amounting at least to negligence on the part of the publisher; and

(d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication." (Emphasis added).

Comment a. to Section 558 refers the reader to Section 581A with respect to the requirement of falsity. Section 581A provides:

"§581A. True Statements

One who publishes a defamatory statement of fact is not subject to liability for defamation if the statement is true."

Comments a. and b. to Section 581A state the following:

"Comment:

a. To create liability for defamation there must be publication of matter that is both defamatory and false. (See §558). There can be no recovery in defamation for a statement of fact that is true, although the statement is made for no good purpose and is inspired by ill will toward the person about whom it is published and is made solely for the purpose of harming him.

Several states have constitutional or statutory provisions to the effect that truth of a defamatory statement of fact is not a defense if the statement is published for 'malicious motives' or if it is not published for 'justifiable ends' or on a matter of public concern. There have been rulings that a provision of this type is unconstitutional, because it is in violation of the First Amendment requirements of freedom of

speech and of the press, and its validity is very dubious. As to an action for violation of the right of privacy by giving unreasonable publicity to details of the private life of another, see §652D.

b. At common law the majority position has been that although the plaintiff must allege falsity in his complaint, the falsity of a defamatory communication is presumed. It has been consistently held that truth is an affirmative defense which must be raised by the defendant and on which he has the burden of proof. The practical effect of this rule has been eroded, however, by the recent Supreme Court holdings that the First Amendment to the Constitution requires a finding of fault on the part of the defendant regarding the truth or falsity of the communication. Pending further elucidation by the Supreme Court, the Institute does not purport to set forth with precision the extent to which the burden of proof as to truth or falsity is now shifted to the plaintiff. See the Caveat to §613, and Comment j."

Section 613 considers the burden of proof in a defamation action. The burden upon the plaintiff includes, *inter alia*, proof of the defamatorty character of the communication. *Id.* at (1)(a). The burden upon the defendant is stated as follows:

> "In an action for defamation the defendant has the burden of proving, when the issue is properly raised, the presence of the circumstances necessary for the existence of a privilege to publish the defamatory communication." *Id.* at (2).

Immediately following Section 613, the Reporter, post-*Gertz*, notes this caveat.

> "The Institute expresses no opinion on the extent to which the common law rule placing on the defendant the burden of proof to show the truth of

> the defamatory communication has been changed by the constitutional requirement that the plaintiff must prove defendant's negligence or greater fault regarding the falsity of the communication."

Lastly, Comment f. to Section 613 provides:

> "f. *Defendant's fault regarding truth or falsity.* Under the Constitution, a plaintiff cannot recover unless the defendant acted negligently, recklessly or with knowledge with regard to the falsity and defamatory character of the communication. (See §580B). The plaintiff has the burden of proving the existence of this fault on the part of the defendant. If the plaintiff is a public official or public figure he cannot recover unless the defendant knew of the falsity of the communication or acted in reckless disregard of it. (See §580A). The plaintiff has the burden of proving this knowledge or reckless disregard. The Supreme Court expressly holds that proof in this case must be with 'convincing clarity.' Whether the same standard of proof is required for proof of negligence in an action by a private person has not been indicated by the Court."

In sum, as the *Restatement (Second) Torts* makes clear, there is no cause of action for defamation unless the defamatory communication is also *false*. *Corabi* agrees at 449, 273 A. 2d at 908, but reiterates the rule at common law that as the reputation of the libel plaintiff is *presumed* to be "good," the defamatory communication is *presumed* to be false. *Id.* at 449, 273 A. 2d at 908. In our view, and as *Wilson v. Scripps-Howard Broadcasting Co., supra*, points out, *Id.* at 375-76, the presumption of falsity thus created may well permit liability without fault on the part of a media defendant. Gertz clearly prohibits such result. We thus decided, and remain firm in that position, that the burden of proving falsity is properly placed upon a plaintiff in a libel action against a

newspaper. Nor in this aspect of the subject do we discern a distinction between public figure plaintiffs and private figure plaintiffs. To draw such distinction would, we believe, effectively distort the balance the Court struck in *Gertz* designed to accommodate the competing values at stake in defamation suits by private individuals against media defendants. *Id.* at 345-49, 94 S. Ct. at 3009-12, 41 L. Ed. 2d at 808-10.

Our interpretation of *Gertz* is, as noted, shared by three United States Circuit Courts of Appeal, two panels of the Third Circuit Court of Appeals, two justices of the Supreme Court of Pennsylvania, a panel of the Superior Court of Pennsylvania[11], and a number of appellate courts in sister jurisdictions. Thus, we did not find that the Decision in *Corabi* binding upon us, and for the same reasons, found 42 Pa. C.S.A. §8343(b)(1), placing as it does the burden of proving truth upon a media defendant, unconstitutional.

(c)

Continuing their attack upon our ruling that 42 Pa. C.S.A. §8343(b)(1) is unconstitutional, the Plaintiffs contend that as the Defendants failed to follow the mandate of Pa. R.C.P. No. 235(a), they waived their right to assert the unconstitutionality of the statute in question.

Rule 235(a) provides:

> "Rule 235. Notice to Attorney General. Constitutionality of Statute
>
> (a) In any proceeding in a court subject to these rules in which an Act of Assembly is alleged to be unconstitutional and the Commonwealth is not a

11. A panel Opinion of the Superior Court, while it cannot overrule a Decision of the Supreme Court, *Commonwealth v. O'Brien*, 273 Pa. Super. 205, 417 A. 2d 236 (1979), has the force of an Opinion of the full Superior Court. *Commonwealth v. Roach*, ____ Pa. Super. ____, 453 A. 2d 1001 (1982).

> party, the party raising the question of constitutionality shall promptly give notice thereof by registered mail to the Attorney General of Pennsylvania together with a copy of the pleading or other portion of the record raising the issue and shall file proof of the giving of the notice. The Attorney General may intervene as a party or may be heard without the necessity of intervention. The court in its discretion may stay the proceedings pending the giving of the notice and a reasonable opportunity to the Attorney General to respond thereto. If the circumstances of the case require the court may proceed without prior notice in which event notice shall be given as soon as possible; or the court may proceed without waiting action by the Attorney General in response to a notice."

To properly consider the Plaintiffs' argument, we briefly recite the essential facts. Although the Defendants' counsel in his opening remarks to the jury, by alluding to the burden of proving falsity, may well have by implication alerted all parties to a constitutional challenge, it is clear that the Defendants directly called the constitutionality of the statute into question in the Defendants' "Points For Charge", submitted to the Court at the conclusion of the trial.

The Defendants' Proposed Points Nos. 10, 11 and 38, all request the Court to instruct the jury that the burden of proving that the publications were false was upon the Plaintiffs by a fair preponderance of the evidence. The Defendants' Amendments to their Proposed Points For Charge, in Points Nos. 11 and 38, also request the same instruction. In contradistinction, the Plaintiffs' Proposed Jury Instructions (First Set) Nos. 28 and 29, ask the Court to instruct the jury that the burden of proving the truth of the publications was upon the Defendants.

As is thus obvious, if the Court had adopted the Defendants' Proposed Points it would have been required to act in violation of 42 Pa. C.S.A. §8343(b)(1). The trial judge determined that the conflicting Points submitted on the issue, in light of *Gertz*, and *Wilson v. Scripps-Howard*, sharply focused upon the question of whether 42 Pa. C.S.A. §8343(b)(1) was indeed constitutional. During the course of a "pre-charge" conference, the Court and counsel for the parties discussed the question and the application of Pa. R.C.P. No. 235(a) (N.T. 3541-51). The Court and counsel agreed that to defer a ruling upon the constitutional question until Rule 235(a) was complied with would be prejudicial to all parties (N.T. 3551, 3589-90). The Court thereupon ruled that the statute was unconstitutional insofar as it placed the burden of proving truth upon the Defendants and instructed the jury accordingly.

In so ruling the Court, in the face of the Defendants' failure to comply with Rule 235(a), relied upon the following language of the Rule:

> ". . . If the circumstances of the case require the court may proceed without prior notice in which event notice shall be given as soon as possible . . ."

The Court then directed the Defendants to notify the Attorney General as soon as possible (N.T. 3590). The Court's ruling and the Final Charge to the jury both occurred on July 13, 1981. *As the record reveals, the Defendants notified the Attorney General the next day, July 14, 1981, in accordance with Rule 235(a). See* Proof of Notice Under Rule 235, Exhibit B, filed of record on July 21, 1981. At this writing, more than two years later, the Attorney General has neither intervened nor responded to the Defendants' notification. Notwithstanding this unchallenged recitation of the facts as gleaned from the record, the Plaintiffs insist that the Defendants'

failure to timely comply with the requirements of Rule 235(a) resulted in a waiver of the right to challenge the constitutionality of the statute. We disagree.

Neither our research nor that of the parties has revealed a decision in Pennsylvania interpreting the specific language of the Rule applied by the Court at bar, *supra*. However, 1 *Goodrich-Amram* 2*d* §235.1 at 390, is instructive on the subject:

> "The normal rule is not inflexible. The court in which the action is pending has complete discretion in the administration of the proceedings, and may, in the unusual case, waive all or part of the normal rule. *In the special situation where a waiting period would be prejudicial, the court may permit the proceedings to go forward without any prior notice to the Attorney General and may direct that notice be given 'as soon as possible.'* The court, even if notice has been given, may permit the proceedings to go forward without waiting for the Attorney General to intervene or take any other action.
>
> The Rule carefully avoids any definition of the conditions under which the court may exercise its discretion to waive the normal rule. It authorizes this 'if the circumstances of the case require.' Like all other grants of discretion to a judge in the court of first instance, his actions may be subject to review if he abuses his discretion." (Footnote omitted) (Emphasis added).

We are convinced that the case before us presented that "special situation" referred to in the above-cited passage. The Plaintiffs rely upon several decisions which mandate a result contrary to that reached here. In *all* such cases, however, unlike the case before us, although the constitutionality of various statutes was challenged, fre-

quently for the first time in appellate briefs, the Attorney General was *never* notified. Such decisions, in our view, are not apposite to the case at bar.

Of more significance to us is the discussion on the subject found in *Commonwealth v. Stein*, 487 Pa. 1, 406 A. 2d 1381 (1979), where the appellant orally challenged the constitutionality of a statute in the lower court but failed to notify the Attorney General of the challenge. The lower court failed to address the constitutional challenge and ruled adversely to the appellant. The appellant appealed the adverse ruling to the Superior Court, raised the constitutional challenge again in his appellate brief and thereupon for the first time notified the Attorney General thereof in accordance with Pa. R.C.P. No. 235(a). The Superior Court affirmed. The appellant then appealed to the Supreme Court and again notified the Attorney General. Addressing the issue, the Supreme Court said:

> "The respondent next contends that petitioner's failure to notify the Attorney General of the Commonwealth of a constitutional challenge to an Act of Assembly in a proceeding in which the Commonwealth is not a party in violation of Pa. R.C.P. 235(a) pretermits our consideration of petitioner's constitutional claims. The rule requires 'prompt' notification of the Attorney General. Under the circumstances of this case in which the court below proceeded forthwith to the adjudication and disposition of the case without addressing itself to the constitutional questions presented by petitioner and where the Attorney General was duly notified of petitioner's claims on appeal of the matter to the Superior Court and to this Court, and neither sought to intervene in this matter nor to raise the issue of lack of prompt notification as a reason for his decision not to intervene, we cannot

> accept this as a basis for refusing to consider the same." *Id.* at 7-8, 406 A. 2d at 1384. (Footnotes omitted).

In *James v. Southeastern Pennsylvania Transportation Authority*, ____ Pa. Super. ____, 459 A. 2d 338 (1983), the appellant also challenged the constitutionality of a statute in the lower court but failed to notify the Attorney General in accordance with Pa. R.C.P. No. 235(a). Again, the lower court failed to address the constitutional issue in its opinion. The appellant appealed to the Superior Court and then notified the Attorney General. Responding to the contention that the issue was waived for the failure to comply with Rule 235(a), the Court said:

> "On appeal, the only issue raised is the constitutionality of this now-repealed statute. Notification of the constitutional challenge at this appellate level was given to the Attorney General in accordance with Pa. R.A.P. 521(a). This notification was sent on February 2, 1982 and a reply from the Attorney General's office dated March 2, 1982, states: 'If no notification is received from this Office within 30 days of the date of this letter, please assume that the Commonwealth will not be entering its appearance in these matters.' To date, more than six months after that letter, the Attorney General has not joined this case.

Usually, a rule is a rule. Rule 235, supra, requires that the Attorney General be notified of a constitutional challenge to a statute at the trial court level. Normally, non-compliance with this rule would mandate our quashing of this appeal. *Irrera v. SEPTA*, 231 Pa. Super. 508, 331 A. 2d 705 (1974), involved a constitutional challenge to this same stat-

ute and also involved a failure to comply with this same rule. The 'issue was deemed abandoned or waived.' *Irrera*, supra, at 515, 331 A. 2d at 708.

In the case before us, appellant did fail to comply with Rule 235; but he did raise the constitutional issue below, it was not addressed by the trial court, he did notify the Attorney General of the appellate proceedings, and the Attorney General did fail to enter the case.

This same configuration of facts existed in the case of *Commonwealth v. Stein*, 487 Pa. 1, 406 A. 2d 1381 (1979). There, considering those particular circumstances, Justice Nix held that the noncompliance with Rule 235 was not 'a basis for refusing to consider the' constitutional issue. *Stein*, supra, at 8, 406 A. 2d at 1384.

[1] We are willingly guided by Justice Nix's thoughts on this matter, even though they are not in this case binding precedent. Under the circumstances occurring here, the noncompliance with Rule 235 is not fatal and we will address the merits of the constitutional challenge." *Id.* at ____, 459 A. 2d at 340. (Footnotes omitted).

We find the same considerations discussed in *Stein* and *James* to guide us at this level. Clearly the purposes of Rule 235(a) have been served. The Attorney General was notified the day following our ruling on the constitutional question. Although more than two years have transpired, the Attorney General has not intervened and has given no indication that he intends to do so. As in *Stein* and *James*, we do not find late compliance with Rule 235(a) as a reason to have avoided addressing the constitutional issue.

As a corollary to the Plaintiffs' argument concerning Rule 235(a), they also contend that as the Defendants did not raise the question of the constitutionality of 42

Pa. C.S.A. §8343(b)(1), the Court should not have *sua sponte* "reached" for the issue, and to have done so constituted a violation of the clear mandage of *Wiegand v. Wiegand*, 461 Pa. 432, 337 A. 2d 256 (1975).

In *Wiegand*, the Superior Court reversed a Common Pleas Court order on the ground that the statute upon which the lower court based its decision was unconstitutional. In reversing the Superior Court and reinstating the lower court's order, the Supreme Court admonished, after observing that the parties had not raised the constitutional issue in either the lower court or in the Superior Court:

> "The Superior Court by sua sponte deciding the constitutional issue exceeded its proper appellate function of deciding controversies presented to it. The court thereby unnecessarily disturbed the processes of orderly judicial decision making. Sua sponte consideration of issues deprives counsel of the opportunity to brief and argue the issues and the court of the benefit of counsel's advocacy. In sua sponte disposition of attacks upon the constitutionality of statutes, the attorney general is denied the opportunity of appearing and responding to the constitutional challenge. See Pa. R.Civ.P. 235(a)." *Id.* at 435, 337 A. 2d at 257.

Contrary to the Plaintiffs' contention, however, the Court at bar did not *sua sponte* reach for and decide the constitutional question. Although the Defendants did not use the language "we ask the court to declare the statute unconstitutional", they did ask the Court "not to follow it" when instructing the jury (N.T. 3545). Obviously, were the Court to have acceded to the Defendants' request without specifically declaring the statute unconstitutional, the same result would have been achieved *sub silento*. The Plaintiffs obviously agree as reference to the following colloquy between the Court and the Plaintiffs' counsel reveals:

"The Court: They [the Defendants] are not having this court declare it unconstitutional. They are not asking that be done certainly. They are saying it should not be followed for the reason —

Mr. Surkin [Plaintiffs' counsel]: They are suggesting a specific statute, which specifically governs in this case by its terms is unconstitutional. They are not saying the court is acting unconstitutionally, but *they are raising the question of constitutionality of a statute.*

The only way this court can instruct a jury that the burden of proof of falsity is on the plaintiffs is to hold that that section of the statute is unconstitutional." (N.T. 3545) (Emphasis added).

Of similar significance, and as earlier noted, the Defendants' Proposed Points For Charge Nos. 10, 11 and 38, all place the burden of proving falsity on the Plaintiffs and the Plaintiffs' Proposed Points For Charge Nos. 28 and 29, are directly contrary. The issue was clearly drawn during the pre-charge conference and discussed at length (N.T. 3541-52). The parties were afforded the opportunity to brief and argue the issue post-trial and did so. The Attorney General was notified. The concerns underlying the Court's decision in *Wiegand* are in no sense present here, and the Plaintiffs' reliance upon *Wiegand* is misplaced.

2

The Plaintiffs next contend that the Court's refusal to instruct the jury in accordance with the Plaintiffs' Proposed Additional Points For Charge Nos. 59 and 60, was error. Both proposed points concern the failure of the Defendants to call certain witnesses during the presentation of the defense case in chief. As the proposed points relate to several classes of witnesses, we consider them separately.

(a)

The Plaintiffs first argue that as the Defendants failed to call as a witness (1) "an editor to testify concerning the scope of editorial review given to [the allegedly defamatory articles] although [the Defendants] had an editor in the courtroom", (2) an expert to refute the Plaintiffs' damage testimony, although such an expert was also present in the courtroom, or (3) two disclosed sources, Alexander Jaffurs or Edward Hussie, the Court should have given the jury the following instruction:

"59. In producing evidence in support of their contentions, defendants did not call any editor to testify concerning the scope of the editorial review given to these articles, they did not call any witnesses concerning plaintiffs' damage presentation, and they did not call as witnesses any sources other than Richard Doran. In particular, defendants did not call as a witness either Alexander Jaffurs or Edward Hussie. The general rule is that where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and without satisfactory explanation, he fails to do so, an inference may be drawn that the evidence if produced would be unfavorable to him. The failure to call an available witness possessing peculiar knowledge concerning facts essential to a party's case gives rise to an inference that the testimony of such uninterrogated witness would not sustain the contention of that party. However, the rule is not operative unless it appears to you that the absent witness has peculiar knowledge or means of knowledge rendering his testimony of importance to the party in a position to call him, and it must first appear that this knowledge exists before the rule can be invoked.

> Your inquiry on this point will be: (1) Is the absent witness available, or has his absence been satisfactorily explained? (2) Does the absent witness possess peculiar knowledge or means of knowledge rendering his testimony of importance to the party in a position to call him? If the witness is available and does possess such peculiar knowledge, then the jury may infer from the fact that he was not called that if he had been produced his testimony would have been unfavorable to the party whose duty it was to call him. Laub, Trial Guide, §596."

The proposed point is, in effect, nothing more than the usual "adverse inference" or "missing witness" instruction, to be given in appropriate circumstances when a party fails to call a witness. *See Pa. SSJI* (Civ) 5.06.

The Supreme Court of Pennsylvania, in *Commonwealth v. Newmiller,* 487 Pa. 410, 409 A.2d 334 (1979), quoted the Superior Court in *Commonwealth v. Birch,* 240 Pa. Super. 587, 361 A.2d 737 (1976), upon the question of when a jury is permitted to draw an adverse inference:

> "As the Superior Court stated:
>
> 'The criteria required before an inference can be drawn from the failure of a party to produce a witness are well-established. " 'Where evidence which would properly be part of a case is within the control of the party whose interest it would naturally be to produce it, and, without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him.' *Wills v. Hardcastle,* 19 Pa. Super. 525, 529 (1902); *Green v. Brooks,* 215 Pa. 492, 496, 64 A. 672 (1906); *Hass v. Kasnot,* 371 Pa. 580, 584, 585, 92 A.2d 171 (1952). *The person not produced must be within the power of the party to produce.* II Wigmore on Evidence,

> §286." *Commonwealth v. Trignani,* 185 Pa. Super. 332, 340, 138 A.2d 215, 219, *aff'd,* 393 Pa. 140, 142 A.2d 160 (1958) (emphasis added). In *Commonwealth v. Jones,* 455 Pa. 488, 495, 317 A.2d 233, 237 (1974) our Supreme Court articulated the "missing witness" inference rule as follows: " '*[W]hen a potential witness is available to only one of the parties* to a trial, and it appears this witness has special information material to the issue, and this person's testimony would not be merely cumulative, then if such party does not produce the testimony of this witness, *the jury may draw an inference it would have been unfavorable.* (Emphasis added.) See McCormick, Law of Evidence, 534 (1954). See also *Bentivoglio v. Ralston,* 447 Pa. 24, 288 A.2d 745 (1972), and *Commonwealth v. Wright,* 444 Pa. 536, 282 A.2d 323 (1971).' *Commonwealth v. Moore,* 453 Pa. 302, 305, 309 A.2d 569, 570 (1973)." *(Emphasis in Commonwealth v. Bird.)*

'The instruction in the instant case permitted the jury to draw an inference against the appellant for the failure to call Ault to the stand. On the basis of the record before us to allow such an inference to be drawn was error. After a thorough review of the record, we are unable to find any evidence which establishes that Ault was "peculiarly within the knowledge and reach" *Bentivoglio v. Ralston,* 447 Pa. 24, 29, 288 A.2d 745, 748 (1972) of the appellant such that the jury might be permitted to draw the inference that Ault's testimony would have been unfavorable to the appellant. Absent such evidence the criterion articulated in *Commonwealth v. Jones,* supra, that the potential witness must be "avail-

> able to only one of the parties" has not been satisfied.' *Commonwealth v. Bird, supra,* at 591, 592, 361 A.2d at 739. (Footnote omitted.)

Further, in *Bird,* the Commonwealth argued that no error was committed in giving the charge because the witness was equally available to both parties. As the Superior Court stated:

> '. . . to the extent Ault was "equally available" to both parties, the law is clear that no inference may be drawn against either party. See *Bentivoglio v. Ralston,* supra at 29, 288 A.2d at 748. The evidence produced at trial simply does not establish the requisite foundation for permitting the jury to draw an inference against the appellant for the failure to call Ault as a witness.' *Commonwealth v. Bird, supra,* at 592, 361 A.2d at 740.' " *Commonwealth v. Newmiller, supra* at 419, 409 A.2d at 838-39.

And see, *Commonwealth v. Jones,* 455 Pa. 488, 317 A.2d 233 (1974); *Commonwealth v. Carey,* ____ Pa. Super. ____, 459 A.2d 389 (1983) (citing cases).

Instantly, it is clear that Messrs. Jaffurs and Hussie, as well as the Defendants' editor, seated in the courtroom and obviously known to the Plaintiffs, were not "peculiarly within the knowledge and reach" of the Defendants alone, but were, rather, equally available to the Plaintiffs, as well. Thus, the instruction was properly refused as to such witnesses.

With respect to the failure of the Defendants to produce any witnesses to refute the Plaintiffs' expert testimony concerning damages, we again find that the proposed instruction was again properly refused. The burden of proving damages was upon the Plaintiffs. 42 Pa. C.S.A. §8343(a)(6). Apparently, as a matter of trial strategy, the Defendants chose to extensively cross-examine the Plaintiffs' damage expert rather than produce an ex-

pert to refute the Plaintiffs' evidence. We are unaware of any authority and the Plaintiffs have cited none, that requires the non-burdened party to produce an expert or any other witness to refute testimony upon an issue produced by the party with the burden of proof at the risk of suffering the sting of an "adverse inference" instruction.

The ultimate sanction for the failure of a defendant to produce witnesses upon the question of damages is an adverse verdict. The Plaintiffs at bar apparently suggest that when a defendant fails to produce witnesses upon any issue upon which a plaintiff has the burden of proof, a court must instruct upon the adverse inference. Such suggestion would in effect *remove* the burden of proving damages from the plaintiff and place the burden of *refuting* damages upon the defendant. As there was no burden of proof upon the Defendants on the issue of damages, the instruction was properly refused. *See, Hertz Corp. v. Hardy,* 197 Pa. Super. 466, 473, 178 A.2d 833, 837 (1962); *Raffaele v. Andrews,* 197 Pa. Super. 368, 370, 178 A.2d 847, 849 (1962) (both limiting the "adverse inference" rule to non-production by the party having the burden of proof); 14 *P.L.E.* §32; *Pa. SSJI* (Civ) 5.06, Subcommittee Note.

(b)

The Plaintiffs next assert that the refusal to instruct the jury upon the Plaintiffs' Proposed Point No. 60, constituted error. During the course of their trial testimony, the Defendant reporters, Ecenbarger and Lambert, continually referred to several confidential sources and when asked, refused to reveal the identities of such sources. As a result of such refusal, the Plaintiffs presented Proposed Point For Charge No. 60, as amended. The Proposed Point follows:

> "60. Under the law of Pennsylvania, members of the media have a statutory right, which defendants have chosen to exercise in this case, to refuse to

identify certain sources of information upon which they claim their articles were based, at least in part. The obvious impact of defendants' exercise of that statutory right in this case has been that plaintiffs were unable to question those sources, to determine their reliability or lack of reliability, to learn from the sources themselves what it was that they told to defendants, and otherwise to fully cross-examine these sources and probe their credibility and that of the reporters who relied upon them. You the jury may consider both defendants' decision to exercise this statutory right, and the effect that it has had upon plaintiffs' presentation at this trial as described above, in reaching your verdict. In other words, it is for you to decide what inferences, if any, should be drawn from defendants' failure to identify certain sources. You may infer, as you deem appropriate, that that defendants were simply endeavoring to protect their sources, or you may infer that, if the sources had been identified, that would have enabled plaintiffs to develop evidence adverse to defendants concerning the truth of the information supplied, and the *existence*, reliability and credibility of the sources." (Emphasis added).

The Court refused to instruct the jury upon the Plaintiffs' Proposed Point upon the ground that to charge the jury in such fashion would effectively emasculate the so-called Shield Law of Pennsylvania[12].

In support of their Proposed Point, the Plaintiffs argue that as interpreted by the Supreme Court in *Taylor and Selby Appeals*, 412 Pa. 32, 193 A. 2d 181 (1963) (hereinafter, "*Taylor*"), "the scope of protection afforded by the Shield Law is determined by the reporter himself: any source which the reporter does not actually publish

12. Act of 1976, July 9, P.L. 586, No. 142, §2, effective June 27, 1978, 42 Pa. C.S.A. §5942, substantially reenacting the Act of 1937, June 25, P.L. 2133, No. 433, §1, 28 P.S. §330.

or publicly disclose shall remain confidential". *Plaintiffs' Memorandum* at 28. As a result, the Plaintiffs contend, there is no effective method of preventing abuse of the privilege afforded by the Shield Law unless the jury is instructed specifically that:

> "it need not accept the reporter's assertion of the Shield Law with blind faith; that it should itself examine the reporter's claim of privilege in light of all the facts in the case; and that it may, if it felt the facts so warranted, conclude that the reporter was not really trying to protect confidential sources, but rather to use the Shield Law solely or primarily to prevent plaintiffs from challenging the existence, reliability and credibility of the sources themselves, because the reporter felt that such a challenge might succeed." *Plaintiffs' Memorandum* at 29-30.

Before we explore the tensions existing between the privilege afforded news reporters by the Shield Law, on the one hand, and the "adverse inference" instruction requested by the Plaintiffs, on the other, it should be noted that the Court twice fully instructed the jury upon the tests of credibility to be applied to the testimony of each witness, including, of course, the testimony of the reporter-witness (N.T. 23-26, 3812-14)[13]. Thus, the jury was, under these instructions, free to believe or disbelieve the reporters' testimony concerning the existence and reliability of confidential sources.

We begin our analysis with the observation that the privilege accorded news reporters by the Shield Law in Pennsylvania is virtually absolute, and the policy underlying this absolute privilege is well stated in *Taylor*:

13. Indeed, as the Defendants suggest, application of the tests of credibility, as applied to the testimony of *all* witnesses, is the "mechanism" designed to prevent abuse of the Shield Law by a reporter. *Defendants' Memorandum* at 41-42.

"It is a matter of widespread common and therefore of Judicial knowledge that newspapers and news media are the principal source of news concerning daily local, State, National and international events. We would be unrealistic if we did not take judicial notice of another matter of wide public knowledge and great importance, namely, that important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty, bribery, corruption, conspiracy and other crimes committed or possibly committed by public officials or by powerful individuals or organizations, unless newsmen are able to *fully and completely* protect the sources of their information. It is vitally important that this public shield against governmental inefficiency, corruption and crime be preserved against piercing and erosion.

The District Attorney points out that such a construction of 'non-disclosure of source' will enable newsmen to conceal or cover up crimes. This is correct. However, we are convinced that the public welfare will be benefited more extensively and to a far greater degree by protection of all sources of disclosure of crime, conspiracy and corruption than it would be by the occasional disclosure of the sources of newspaper information concerning a crime! Furthermore, this has been the public policy in Pennsylvania in respect to various relationships since 1887. For example, a client can confess to his attorney that he has committed a crime, but the disclosure of crime cannot be given by the attorney unless the client waives his privilege; and a person can confess to his clergyman, priest, rabbi or minister of the gospel that he or some named person has committed a crime, but the disclosure cannot be given unless the confessor waives his privilege.

In each of these cases the Legislature has declared as a matter of public policy that information concerning the crime need not be disclosed by the lawyer or clergyman, as the case may be, even though the non-disclosure protects a criminal. The Act of 1937 is a wise and salutary declaration of public policy whose spiritual father is the revered Constitutionally ordained freedom of the press. *The Act must therefore, we repeat, be liberally and broadly construed in order to carry out the clear objective and intent of the Legislature which has placed the gathering and the protection of the source of news as of greater importance to the public interest and of more value to the public welfare* than the disclosure of the alleged crime or the alleged criminal." *Id.* at 41-42. (Emphasis partly in original) (Footnotes omitted).

As is thus apparent, the Supreme Court has directed that we "liberally and broadly" construe the statutory privilege accorded newspersons to refuse to divulge the names of confidential sources — in the public interest. To instruct a jury, in the face of the Shield Law thus construed, that it might conclude that there were *no* such sources would, in our view, render the privilege a nullity.

In *Maressa v. New Jersey Monthly*,____ N.J. ____, 445 A. 2d 376 (1983), the New Jersey Supreme Court was called upon to decide whether the State's Shield Law[14], permits reporters to refuse to disclose their confidential sources in libel cases, and if it does, whether a jury may be permitted to draw an adverse inference from a reporter's failure to identify confidential sources.

It should first be noted that unlike Pennsylvania's Shield Law, the New Jersey statute specifically provides that the trier of fact may *not* draw any adverse inference from the exercise of the privilege not to disclose confi-

14. N.J.S.A. §2.A:34A-21.

dential sources: N.J.S.A. §2A:84A-31. Rule 39. Nevertheless, the *Maressa* Court's policy determination for holding a reporter's privilege to be absolute is instructive and, we think, apposite at bar.

The *Maressa* Court first notes that "the State has created the [defamation] cause of action and hence . . . it can limit, modify or perhaps take it away through the operation of testimonial privileges, absent any claim of constitutional deprivation". *Id.* at ____, 445 A.2d at 384, (*citing Mazzella v. Philadelphia Newspapers, Inc.*, 479 F. Supp. 523 (E.D.N.Y. 1979) (applying Pennsylvania Law)).

The *Maressa* Court then elucidated its high regard for the testimonial privilege accorded reporters:

> "We have sustained testimonial privileges, even at the cost of denying a party information possibly vital to his action, 'because in the particular area concerned, they are regarded as serving a more important public interest than the need for full disclosure.' *State v. Briley*, 53 N.J. at 506, 251 A.2d 442. In *Cashen v. Spann*, 66 N.J. 541, 556, 334 A.2d 8 (1975), *cert. den.* 423 U.S. 829, 96 S. Ct. 48, 46 L. Ed. 2d 46 (1975), the Court 'emphasize[d] that in civil cases in which disclosure is sought . . . for the purpose of asserting claims for money damages, the interests of the State in maintaining . . . confidentiality . . . are entitled to a greater degree of respect.' Federal courts have also noted that plaintiffs in civil actions do not have a compelling interest in obtaining confidential information. *See e.g., Baker v. F. & F. Investment*, 470 F.2d 778, 785 (2d Cir. 1972), *cert. den.*, 411 U.S. 966, 93 S. Ct. 2147, 36 L. Ed. 2d 686 (1973); *Democratic National Committee v. McCord*, 356 F. Supp. 1394 (D.D.C. 1973)." *Id.* at , 445 A.2d at 385.

In sum, *Maressa* determined that the burden placed upon a libel plaintiff by the operation of a shield law must

be tolerated as the testimonial privilege served a more important public interest than the necessity of full disclosure. The same reasoning applies at bar, as is clearly noted in *Taylor, supra*.

It must also be observed that the so-called adverse inference is a principle of evidence. *Commonwealth v. Moore*, 453 Pa. 302, 309 A.2d 569 (1973); *Steel v. Snyder*, 295 Pa. 120, 127-28, 144 A. 912, 914-15 (1929). If this evidentiary principle is permitted to operate in a libel case, in the face of the Shield Law and the broad interpretation accorded that Law in *Taylor*, we should surely be in the position of giving a reporter the protection of the Shield Law with one hand and removing it with the other. We do not subscribe to the view that *Taylor* permits such result.

Professor McCormick has also examined the question of the practical limitation on the exercise of testimonial privileges when adverse inferences are permitted to be drawn when such privileges are claimed. *McCormick on Evidence* (Cleary 2 ed. 1972) §§76, 272. McCormick first notes that the United States Supreme Court in *Griffith v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965), held that permitting comment upon the failure of a defendant to testify violates his Fifth Amendment privilege against self-incrimination "by making its assertion costly". *Id.* at 614, 85 S. Ct. at 1233, 14 L. Ed. at 110.

McCormick then suggests that the principle of *Griffin v. California, supra*, should be applied to testimonial privileges that are soundly based in policy. Such privileges, in McCormick's view, should be accorded the fullest protection. *Id.* at 156. The strong public policy underlying the Shield Law in Pennsylvania is clearly articulated in *Taylor*. *See also, Steaks Unlimited, Inc. v. Deaner, supra* at 279; *Mazzella v. Philadelphia Newspapers, Inc., supra* at 525, 528-29; *Hepps v. Philadelphia Newspapers, Inc., supra* at 714. Thus, the application of Professor McCormick's postulation, and the succinct

holding in *Taylor* compels the conclusion that the Shield Law must prevail and that the Court did not err in refusing the Plaintiffs' requested adverse inference instruction.

3

In several of the allegedly defamatory articles, the Defendant reporter William Ecenbarger reported upon a decision of the Court of Common Pleas of Lancaster County and the legal proceedings in that Court involving the Plaintiffs that led to the decision. The Plaintiffs contended at trial and in their post-trial argument that Ecenbarger's reports interpreting the proceedings and the decision were incorrect and the most damaging to the Plaintiffs of several possible interpretations. At the conclusion of the trial, the Plaintiffs requested the Court to instruct the jury in accordance with Plaintiffs' Proposed Point No. 27, as follows:

> "27. When a reporter undertakes to report to the public the results of a judicial proceeding the meaning of which might be unclear, the reporter does not have the right to choose from among several possible interpretations and publish only the interpretation most damaging to the Plaintiffs. If he decides to proceed in this fashion, he must not only show that his interpretation was plausible, but also that it was correct. *If the interpretation chosen and reported by the reporter is not correct, that can constitute negligence on his part.*" (Emphasis added).

The Court refused to instruct the jury in accordance with the Plaintiffs' Proposed Point and the Plaintiffs now assert, in support of their Motion for a new trial, that the Court thus committed error.

The Plaintiffs' contention is based upon a "rule" they perceive to have been enunciated by Justice Rehnquist in his plurality Opinion in *Time, Inc. v. Firestone,* 424

U.S. 448, 96 S. Ct. 958, 47 L. Ed. 2d 154 (1976). Such "rule", the Plaintiffs contend, is to be applied in private figure libel cases in which a media defendant reports the outcome of a judicial proceeding. *Plaintiffs' Memorandum* at 32.

In their Memorandum, the Plaintiffs quote that part of Justice Rehnquist's Opinion they contend sets forth the "rule" upon which their Proposed Point is based:

> "Petitioner may well argue that the meaning of the trial court's decree was unclear, but this does not license it to choose from among several conceivable interpretations the one most damaging to respondent. Having chosen to follow this tack, petitioner must be able to establish not merely that the item reported was a conceivable or plausible interpretation of the decree, but that the item was factually correct. We believe there is ample support for the jury's conclusion, affirmed by the Supreme Court of Florida, that this was not the case. There was, therefore, sufficient basis for imposing liability upon petitioner if the constitutional limitations we announced in *Gertz* have been satisfied." *Plaintiffs' Memorandum* at 32.[15]

The Plaintiffs argue that Ecenbarger's interpretation of the Lancaster County proceedings as reported by him and published by the Inquirer, was the most damaging of all possible interpretations and that such interpretation was incorrect. *Plaintiffs' Memorandum* at 33. Thus, the Plaintiffs assert, the jury at bar was required to decide two issues: (1) which of several possible interpretations

15. The Plaintiffs' quotation fortuitously omits the last sentence of the paragraph:

> ". . . These are a prohibition against imposing liability without fault . . . and the requirement that compensatory awards 'be supported by competent evidence concerning the injury'." *Time, Inc. v. Firestone, supra* at 459, 96 S. Ct. at 968, 47 L. Ed. 2d at 166.

was correct, and (2) was Ecenbarger's interpretation the most damaging to the Plaintiffs? The Plaintiffs contend that since such issues were before the jury, Proposed Point No. 27 should have been given so as to enable the jury to understand the conclusion it might reach upon resolving the foregoing factual issues.

As is easily seen, the Plaintiffs' Proposed Point requests an instruction to the effect that the choice and publication of an interpretation of an ambiguous judicial proceeding damaging to a plaintiff may, without more, constitute negligence unless the reporter proves that the interpretation chosen and reported was correct. In our view, the Proposed Point represents a serious misperception of the law.

At the outset, the Proposed Point, by requiring the reporter to prove the accuracy of his interpretation or suffer a finding of negligence, in effect asserts that falsity and negligence are one in the same and places the burden of proving freedom from both upon the reporter. Thus, the Plaintiffs again request that the burden of proving truth be placed upon the libel defendant, and again, we find this constitutionally impermissible. *See, Subpart 1, supra; Gertz, supra.*

Of similar significance, our reading of *Time, Inc. v. Firestone, supra,* belies the Plaintiffs' assertion that the "rule" allegedly announced by Justice Rehnquist was indeed a rule at all or represented a holding in the case. The paragraph cited by the Plaintiffs was merely a response to a contention advanced on appeal by Time, Inc. The Supreme Court after determining that there was sufficient evidence to support a finding that Time, Inc. had selected and published an incorrect interpretation of a judicial proceeding, noted that "the prohibition against imposing liability without fault" remained to be overcome. Thus, it is clear that selecting and published an incorrect interpretation of a judicial proceeding that is damaging to a plaintiff is not *alone* sufficient to impose liability and is thus not sufficient to support a finding of

negligence. The Plaintiffs' Proposed Point No. 27 was properly refused.

4

In their Complaint, the Plaintiffs asserted, *inter alia*, that the Defendants acted with actual malice, and coupled this assertion with a demand for punitive damages. *Plaintiffs' Complaint*, Paras. 10, 13, 15, 23, 25, 30, 35, 40, 43, 45, 50, 53, 55. At the conclusion of the Plaintiffs' case and following argument on the issue, the Court ruled that ". . . no reasonable jury can find actual malice on the part of the reporter defendants, and accordingly, the issue of punitive damages is withdrawn from the jury's consideration" (N.T. 3310).

As their final assertion of error, the Plaintiffs contend that the issue of punitive damages should have been submitted to the jury and not withdrawn by the Court. Underlying the Plaintiffs' argument is the further contention that the Plaintiffs produced sufficient evidence of actual malice on the part of the Defendants to permit the jury to award the Plaintiffs punitive damages. *Plaintiffs' Memorandum* at 34-46. *See Gertz, supra* at 349-50, 94 S. Ct. at 3011-12, 41 L. Ed. 2d at 810-11.

As interesting as the Plaintiffs' final issue may be, we need not and thus do not reach it, as it will be recalled that before a court may grant a new trial upon the basis of errors made at trial, it must conclude that such errors led to an incorrect result, *Warren v. Mosites Construction Co.*, 253 Pa. Super. 395, 403, 385 A.2d 397, 401 (1978), and it is incumbent upon the moving party to "demonstrate in what way the trial error[s] caused such incorrect result", *Nebel v. Mauk*, 434 Pa. 315, 318, 253 A.2d 249, 251 (1969). *See also Sevich v. Commonwealth*, 434 Pa. 68, 252 A.2d 644 (1969).

At bar, the Plaintiffs have failed to demonstrate that the failure of the Court to instruct the jury upon the issue of punitive damages could have, in any respect, *properly*

affected the verdict. The jury found the Defendants not liable to the Plaintiffs following a trial at which the Plaintiffs presented full and complete evidence concerning liability and damages. The only evidence prohibited as the result of the Court withdrawing the issue of punitive damages from the jury was evidence of the Defendants' net worth. *See Feld v. Merriam,* ____ Pa. Super. ____, ____, 461 A.2d 225, 237-38 (1983) (Collects cases). Obviously, as the jury found the Defendants not liable to the Plaintiffs, the jury never reached the issue of damages. Thus, even if the Court *had* instructed the jury upon the issue of punitive damages, such instruction would have made no difference in the result. Accordingly, the failure to instruct upon punitive damages is irrelevant, and if error, was and remains error in the abstract. *Warren v. Mosites Construction Co., supra.* [16]

It should also be noted that in order to recover punitive damages, the Plaintiffs were required to prove "actual malice" on the part of the Defendants by clear and convincing evidence[17], *New York Times Co. v. Sullivan, supra; Gertz, supra.* On the other hand, to recover compensatory or "actual" damages, the Plaintiffs, as private figures, were required to prove negligence on the part of the Defendants, merely by a preponderance of the evidence. The "clear and convincing" standard is of course more burdensome and difficult to carry than the "mere preponderance" standard. The jury, by its verdict, indicated clearly that the Plaintiffs had failed to carry their "mere preponderance" burden. Certainly, if the Plaintiffs

16. We therefore inevitably conclude that the only purpose to be served by instructing the jury upon the subject of punitive damages would have been to prejudice the jury against the Defendants.

17. This burden of proof is explicated in *Matter of Jackson,* 302 Pa. Super. 369, 374, 448 A.2d 1087, 1089 (1982), *quoting in part In re Jackson,* 267 Pa. Super. 428, 431, 406 A.2d 1116, 1118, which, in turn, *quotes LaRocca Trust,* 411 Pa. 633, 640, 192 A.2d 409, 413 (1963).

failed to carry their lesser burden, they surely could not have overcome the burden of proving actual malice by clear and convincing evidence. There was no error.

Thus finding the Plaintiffs' contentions to be without merit, we denied their Motion for a new trial.

BY THE COURT;

_____

J.

Filed: October 24, 1983.

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APPENDIX 3

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

MAURICE S. HEPPS, et al., *Appellants*	:	No. 18 E.D. Appeal Docket 1983
	:	
	:	(C.P. Chester, Civil Action-Law,
v.	:	No. 36 May Term, 1976)
	:	
PHILADELPHIA NEWSPAPERS, INC., et al.	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the trial court is reversed and a new trial is awarded. The new trial will be confined to a determination of defendant's liability and the assessment of compensatory damages if the liability issue is decided in favor of the plaintiff.

BY THE COURT:

Marlene F. Lachman, Esq.
Prothonotary

Dated: December 14, 1984

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APPENDIX 4

IN THE SUPREME COURT OF PENNSYLVANIA
FOR THE EASTERN DISTRICT

MAURICE S. HEPPS, et al.,	:	No. 18
	:	
Appellants	:	E.D. Appeal
	:	Docket 1983
v.	:	
	:	
PHILADELPHIA NEWSPAPERS, INC., et al.,	:	
	:	
Appellees	:	

NOTICE OF APPEAL

Notice is hereby given that appellees Philadelphia Newspapers, Inc., William Ecenbarger and William Lambert hereby appeal to the Supreme Court of the United States from the Judgment of the Supreme Court of Pennsylvania, dated December 14, 1984, reversing the order of the trial court and awarding a new trial to appellants herein.

This appeal is taken pursuant to 28 U.S.C. §1257(2), in that there was drawn into question before this Court the validity of a statute of the Commonwealth of Pennsylvania on the ground of it being repugnant to the Constitution of the United States, and the decision of this Honorable Court was in favor of its validity.

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Dated: March 14, 1985